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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1954**

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**No. 33**

**UNITED STATES OF AMERICA, PETITIONER,**

**VS.**

**MICHAEL P. ACRI, DOLLAR SAVINGS AND TRUST  
COMPANY, THE DOLLAR SAVINGS AND TRUST  
COMPANY OF YOUNGSTOWN, OHIO, ETC., ET AL.**

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

**PETITION FOR CERTIORARI FILED MARCH 16, 1954**

**CERTIORARI GRANTED MAY 24, 1954**

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# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 33

UNITED STATES OF AMERICA, PETITIONER,

vs.

MICHAEL P. ACRI, DOLLAR SAVINGS AND TRUST  
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COMPANY OF YOUNGSTOWN, OHIO, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS  
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## INDEX

	Original	Print
Proceedings in the U.S.C.A. for the Sixth Circuit	1	1
Appendix to appellant's brief	1	1
Statutes	1	1
Docket entries	8	6
Stipulation of facts	11	8
Stipulation to amend agreed statement of facts by in- sertion and order thereon	16	11
Memorandum on motions for summary judgment	16	12
Findings of fact and conclusions of law	20	14
Judgment	23	17
Notice of appeal	24	17
Appendix to appellee's brief	29	18
Defendant's Exhibit A—Judgment of the Court of Common Pleas, Oravitz vs. Acri	29	18
Plaintiff's Exhibit 1—Notice of Tax Lien etc	31	19
Plaintiff's Exhibit 2—Notice of Levy	33	21
Statutes	34	21
Argument and submission (omitted in printing)	39	
Judgment	39	23
Clerk's certificate (omitted in printing)	41	
Stipulation as to the printing of the record	43	24
Order granting certiorari	46	25

1 In United States Court of Appeals

**Appendix to Appellant's Brief—Filed July 30, 1953**

STATUTES

Internal Revenue Code:

SEC. 3670. PROPERTY SUBJECT TO LIEN

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670).

SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

2 (2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court

of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

\* \* \* \* \*

(26 U. S. C. 1946 ed., Sec. 3672.)

Page's Ohio General Code, Annotated (1937):

SEC. 11819. *Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

\* \* \* \* \*

(6) Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

\* \* \* \* \*

(8) Has property or rights in action, which he conceals;

\* \* \* \* \*

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; \* \* \*

\* \* \* \* \*

SEC 11820. *Affidavit for order of attachment; contents.* An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing;

- (1) The nature of the plaintiff's claim;
- (2) That it is just;
- (3) The amount which the affiant believes the plaintiff ought to recover; and
- (4) The existence of any one of the grounds for an attachment enumerated in such section.

\* \* \* \* \*

SEC. 11826. *How order executed.* The sheriff shall execute the order of attachment without delay. He shall go to the place where the defendant's property is, and there, in the presence of two freeholders of the county, declare that, by virtue of the order, he attaches the property at the suit of the plaintiff. Then with the freeholders, who must be first sworn by him, he shall make a true inventory and appraisement of all the property attached, which shall be signed

by the officer and freeholders, and returned with the order. When the property attached is real property, the officer shall leave with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order. When it is personal property, and can be come at, he shall take it into his custody, and hold it subject to the order of the court. (R. S. Sec. 5528.)

SEC. 11827. *When property may be delivered to persons with whom found.* The sheriff shall deliver the property attached to the person in whose possession it was found, upon his executing, in the presence of the sheriff, a bond to the plaintiff, with sufficient surety, resident in the county, to the effect that the parties to it are bound, in double the appraised value of the property, that it or its appraised value in money will be forthcoming to answer the judgment of the court in the action. If it appears to the court that any part  
4 of such property has been lost or destroyed by unavoidable accident, the value thereof must be remitted to the person so bound. (R. S. Sec. 5529.)

SEC. 11828. *Service of garnishee.* When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. Sec. 5530.)

\* \* \* \* \*

SEC. 11836. *Form of return.* The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. Sec. 5537.)

SEC. 11837. *When property and garnishee bound.* An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. Sec. 5538.)

\* \* \* \* \*

SEC. 11843. *How attached property disposed of.* The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. (R. S. Sec. 5544.)

\* \* \* \* \*

SEC. 11847. *Appearance and answer of garnishee.* After the written notice is issued as hereinbefore provided, the garnishee shall appear and answer within the time allowed the defendant or defendants to answer the petition upon which the attachment was granted. Under oath, he shall answer all questions put to him touching property of every description, and credits of the defendant in his possession or under his control and truly disclose the amount owing by him to the defendant, whether due or not in the case of a corporation, any stock held therein by or for the benefit of the defendant, at or after the service of notice. (R. S. Sec. 5547.)

SEC. 11848. *Garnishee may pay money into court or to sheriff.* A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs.

When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in force from the time of its service until the trial of the cause to determine the claim, debt or demand of the creditor and bind all such earnings due at the time of service, and which will become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor. (R. S. Sec 5548.)

\* \* \* \* \*

SEC. 11850. *Disposition of property in hands of garnishee.* If the garnishee appears and answers and on his examination it be discovered that at or after the service of the order of attachment and notice upon him, he was possessed of property of the defendant, and was indebted to him, or either, the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs. (R. S. Sec. 5550.)

\* \* \* \* \*

SEC. 11853. *Judgment against garnishee.* Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. Sec. 5553.)

7 SEC. 11854. *Judgment for defendant.* If the judgment in the action be rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds returned to him. (R. S. Sec. 5554.)

SEC. 11855. *Proceedings after judgment for plaintiff.* If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property, and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and execution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant. (R. S. Sec. 5555.)

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OHIO,  
EASTERN DIVISION

UNITED STATES OF AMERICA, *Plaintiff*

vs.

MICHAEL P. ACRI, FLORENCE E. ACRI, UNION NATIONAL BANK,  
DOLLAR SAVINGS & TRUST COMPANY, and EDWARD ORAVITZ, Ad-  
ministrator of the Estate of John Gravee, a.k.a. Oravitz, De-  
ceased, THE DOLLAR SAVINGS & TRUST COMPANY OF YOUNGSTOWN,  
OHIO, Guardian of the Estate of Michael P. Acri, *Defendants*.

DOCKET ENTRIES

8/11/48. Complaint filed.

8/11/48. Summons issued. 5 copies of summons to the Marshal.

8/19/48. Summons retn. & filed. Served all of the defendants  
with the exception of Michael P. Acri who is not in district.

8/16/48. Fees \$11.96.

8/23/48. Stipulation & order granting defendants leave to move  
or plead by 9/15/48 filed. Wilkin, J. Noted 8/23/48. Notice  
waived.

8/25/48. Answer of Union National Bank of Youngstown filed.  
3 copies mailed from the office to U. S. Atty.

9/21/48. Answer of The Dollar Savings & Trust Co. filed. Copy  
mailed.

9 9/21/48. Stipulation & Order granting defendants leave  
to move or plead by Oct. 1, 1948 filed. Freed, J. Noted  
9/21/48. Notice waived.

10/4/48. Stipulation & order granting defendants leave to move  
or plead by 10/23/48 filed. Freed J. Noted 10/4/48. Notice  
waived.

10/4/48. Application & order making the Dollar Savings &  
Trust Co., of Youngstown, Ohio, Guardian of the Estate of Michael  
P. Acri, a party to this action filed & ent. Freed, J. Noted 10/4/48.  
Notice waived.

10/4/48. Summons issued. Copy of summons to Marshal.

10/7/48. Summons retn. & filed. Served The Dollar Savings &  
Trust Co. 10/6/48. Fees \$2.12.

10/20/48. Answer of Florence E. Acri filed. Copies mailed  
10/19/48.

10/22/48. Answer of The Dollar Savings & Trust Co. of Youngs-  
town, Ohio, Guardian of Estate of Michael P. Acri filed. Copies  
mailed 10/21/48.

1/27/49. Stipulation & Order granting Edw. Oravitz, Admr.

leave to file answer and cross-petition instanter filed. Freed, J. Noted 1/27/49. Notice waived.

1/27/49. Answer and Cross-Petition of Edward Oravitz, Admr. filed. Copy mailed.

9/9/49. Request for trial filed.

12/7/49. Consent order that Youngstown City Lot No. 14,738 may be sold free and clear of inchoate right of dower as to Florence Acri and dismissing all other issues as to said Florence E. Acri filed. Jones, J. Noted 12/7/49. Notice waived.

4/21/50. Stipulation of facts filed.

4/21/50. Motion for order of judgment in favor of defendant, Edward Oravitz, admr. with brief in support filed. Copy mailed 4/21/50.

5/25/50. Stipulation & order that the U. S. be granted until 6/10/50 to file its response to brief filed by defendant Edward Oravitz filed. Jones, J. Noted 5/25/50. Notice waived.

10/7/31/50. Stipulation & order amending the agreed statement of facts by insertion filed. Freed, J. Noted 7/31/50. Notice waived.

7/31/50. Stipulation & order that the decision in this case be held in abeyance until the Supreme Court of the U. S. decides the case of U. S. vs. Security Bank & Trust Co. of San Diego filed. Freed, J. Noted 7/31/50. Notice waived.

1/11/51. Motion of plaintiff for summary judgment with brief filed. Copy mailed 1/11/51.

2/23/51. Stipulation and order that defendant Edward Oravitz may file his brief in opposition to plaintiff's motion for summary judgment by March 21, 1951 filed. Freed, J. Noted 2/23/51. Notice waived.

3/29/51. Stipulation & order granting defendant Edward Oravitz leave to file brief in opposition to motion for summary judgment by 4/23/51 filed. McNamee J. Noted 3/29/51. Notice waived.

5/9/51. Stipulation and order granting defendant Edward Oravitz, leave to file Brief in opposition to motion of plaintiff for summary judgment by 6/15/51 filed. McNamee Noted 5/9/51. Notice waived.

7/17/51. Stipulation & Order that supplemental and reply brief of defendants may be filed instanter filed, Jones, J. Noted 7/17/51. Notice waived.

7/17/51. Supplemental and reply brief of defendants in support of motion for judgment on pleadings filed. Copy served 7/16/51.

7/17/51. Stipulation & Order withholding ruling on motions and briefs until after October 1, 1951 filed, Jones, J. Noted 7/17/51.

10/10/52. Memorandum Opinion filed, Jones, J. (Motion for summary judgment granted in part) Copies to counsel.

10 22 52. Stipulation & Order extending time for defendant Oravitz, Admf. to lodge finding of fact to and including Nov. 10, 1952 filed. Jones, J. Noted 10 22 52. Notice waived.

11 11/6 52. Findings of Fact and Conclusions of Law proposed by defendant Oravitz lodged. Copy served 11/6 52.

11/19 52. Stipulation and order granting USA leave to file objections to proposed findings of fact and conclusions of law by Dec. 1, 1952 filed. Jones, J. Noted 11 19 52. Notice waived.

12/18 52. Findings of Fact and Conclusions of Law filed. Jones, J. Counsel notified.

12/18 52. Judgment denying motion for summary judgment in respect of priority on lien of U. S. and granting summary judgment in respect to cross-petition of defendant Oravitz without costs filed. Jones J. Noted 12/18 52. Counsel notified.

2/12 53. Notice of Appeal filed. Copies mailed by Clerk to F. B. Kavanagh and to John A. Willow, counsel for defendant Edw. Oravitz, Admf. 2/12/53.

3/17/53. All of original papers and pleadings mailed to Clerk of U. S. Court of Appeals, Cincinnati, Ohio.

3/19/53. Acknowledgment of receipt of Transcript of Record of original papers on Appeal filed in U. S. Court of Appeals on 3/18/53 and docketed as No. 11,864, filed.

### IN THE UNITED STATES DISTRICT COURT

#### STIPULATION OF FACTS—Filed April 21, 1950

It is hereby stipulated and agreed to by the parties to this action as to the following facts:

That the Commissioner of Internal Revenue duly assessed taxes against the defendant Michael P. Acri for the years 1942 to 1946, inclusive, and that demand for payment of said taxes was mailed to the defendant Michael P. Acri on November 19, 1947; that on November 21, 1947, a notice of tax lien was filed in the office of the

Recorder of Mahoning County, Youngstown, Ohio; that on 12 the same date a notice of tax lien and notice of levy was served upon the Dollar Savings and Trust Company, at Youngstown, Ohio, claiming taxes due and owing from Michael P. Acri in the amount of \$79,551.80 (Plaintiff's Exhibits 1 and 2); that subsequent to the determination and notices as hereinbefore mentioned the Commissioner of Internal Revenue ascertained the taxes as against the defendant, Michael P. Acri, for the years 1942 to 1946, inclusive, to be in the amount of \$71,543.82; and that subsequently, on June 7, 1948, notice of tax lien was filed in said amount with the Recorder of Mahoning County, Ohio, and a second notice of levy was served on the Dollar Savings and Trust Company,

Youngstown, Ohio, as to the defendant Michael P. Acri's indebtedness for taxes.

That on August 6, 1947, Edward Gravitz, the duly appointed Administrator of the Estate of John Oravec, a.k.a. Oravitz, deceased, filed a suit against the defendant Michael P. Acri and on such date there was issued a writ of attachment directed to the Dollar Savings and Trust Company and service had thereon on R. W. Dickey, Comptroller of said bank, and return made thereon according to law, covering monies, securities and property of the defendant, Michael P. Acri, as deposited in a safety deposit box which was rented and maintained for said defendant's use in the Safety Deposit Vault Department of said Dollar Savings and Trust Company; that a transcript of said proceedings in the Common Pleas Court of Mahoning County, Ohio, in connection with said suit, is attached to the Stipulation of Facts as herein agreed upon; and that a judgment was entered in said case, being Case No. 124,893, on January 19, 1949, in the amount of \$18,500.00 as against the defendant, Michael P. Acri, for wrongful death (Defendant's Exhibit A).

It is further agreed that an application was made for the appointment of a guardian of the estate of Michael P. Acri in the Probate Court of Mahoning County, Ohio, and that on the 14th day of June, 1948, the Dollar Savings and Trust Company, Youngstown, Ohio, was appointed as guardian of the estate of Michael P. Acri, a confined person.

It is further noted that Florence E. Acri, the divorced wife of the defendant Michael P. Acri, has withdrawn her answer to the complaint as filed by the Government and has been dismissed as a party-defendant, she claiming no interest in the controversy in connection with the contents of the safety deposit box at the Dollar Savings and Trust Company, Youngstown, Ohio, carried in the name of Michael P. Acri, the funds remaining on deposit in their guardianship account, or any other property owned by Michael P. Acri as herein set forth and of which the said Dollar Savings and Trust Company is the guardian and custodian.

It is further agreed, on behalf of the Dollar Savings and Trust Company, Youngstown, Ohio, as guardian of said Michael P. Acri, that there is no issue as to the amount of the taxes assessed against the defendant Michael P. Acri, and that they are acting only as a disinterested stake holder with reference to the moneys and assets now remaining in their possession in the safety deposit box or by virtue of receipts turned over to them in the form of rentals.

It is further agreed that during the period from August 6, 1947, when the aforesaid attachment in said Case No. 124893 was levied on the property and effects of said Michael P. Acri as deposited in said safety deposit box, no person was admitted to the contents of said safety deposit box until September 11, 1948, when an inventory

of the contents thereof was made by said Dollar Savings and Trust Company, as the duly appointed and acting guardian of the estate of said Michael P. Acri.

It is further agreed that upon the taking of said inventory on September 11, 1948, there was found in the safety deposit box maintained in the name of Michael P. Acri, the same being denoted as Box No. 719 in the Safety Vault Department of said

14 Dollar Savings and Trust Company, the property of said Michael P. Acri, in currency the sum of \$35,821.00; that in addition to the amount of cash aforesaid there were likewise in said safety deposit box United States Savings Bonds, Series E, in the name of Michael P. Acri or Mrs. Florence E. Acri, said bonds having a total maturity value of \$8,600.00; that there was also a bond in the amount of \$25.00 payable to Michael P. Acri; a \$25.00 bond payable to James Acri or Michael Acri; and a \$25.00 bond payable to James Acri or Mrs. Florence Acri. A copy of said inventory and a report filed by said guardian in the Probate Court of Mahoning County is attached hereto and marked "Defendant's Exhibit B."

It is further agreed that the aforementioned monies, securities and property of said Michael P. Acri as deposited in said Safety Deposit Box No. 710 and set forth in the above mentioned Guardian's inventory have remained in the possession and custody of said Dollar Savings and Trust Company and are being held thereby pending determination and final disposition of the priority of liens asserted against said property by the respective parties herein.

It is further agreed upon that the defendant, Michael P. Acri, is the owner and title holder of city lot No. 14,738, together with building located thereon, being at the intersection of Bruce Avenue and Oak Street, in Youngstown, Ohio, subject to certain claims of Florence Acri and the United States of America for taxes in the net income derived and to be derived from said lot as more fully set forth in Journal Entry in the case of *Florence Acri vs. Michael P. Acri, et al.*, Mahoning County Court of Common Pleas Case No. 122723. A copy of said Journal Entry is attached hereto and marked "Defendant's Exhibit C."

It is further agreed that the Dollar Savings and Trust Company has a certain claim against the said estate of Michael F. Acri in the sum of \$500.00, which claim includes attorneys fees and guardianship fees.

15 The only issue in this action is the question of priority of liens concerned with the writ of attachment issued and served on August 6, 1947, in the case of *Edward Oravitz vs. Michael Acri*, being Mahoning County, Ohio, Common Pleas Court Case No. 124,893, and in which case judgment was entered on January 19, 1949, in the amount of \$18,500.00, and the tax lien of the United States as evidenced by the notice of tax lien filed with the Recorder

of Mahoning County on November 19, 1947, and the notice of levy served upon the Dollar Savings and Trust Company on November 21, 1947, as evidenced by notice of tax lien and notice of levy attached hereto.

DON C. MILLER,  
*United States Attorney.*  
 By FRANK E. STEEL,  
*Assistant United States Attorney.*  
*Attorneys for Plaintiff.*  
 \_\_\_\_\_,  
 \_\_\_\_\_,  
*Attorneys for Dollar Savings and*  
*Trust Company.*  
 \_\_\_\_\_,  
*Attorney for Edward Oravitz,*  
*Defendant.*  
 \_\_\_\_\_,  
*Attorney for Edward Oravitz,*  
*Defendant.*

16 In United States District Court

STIPULATION TO AMEND AGREED STATEMENT OF FACTS BY INSERTION—  
 Filed July 31, 1950

We, the attorneys for the respective parties, do hereby stipulate that the following be inserted in the Agreed Statement of Facts in the above-entitled case, on line 5 of page 1, after the word "inclusive": "and the assessment list received by the Collector of Internal Revenue on November 18, 1947," and that the Court may enter an order accordingly, notice by the Clerk being hereby waived.

FRANK E. STEEL,  
*Asst. U. S. Attorney,*  
*Attorney for Plaintiff.*  
 JOHN A. WILLO,  
*Union National Bank Bldg.,*  
*Youngstown, Ohio,*  
*Attorney for Defendant.*

It is so ordered:

FREED,  
*United States District Judge.*

## In United States District Court

## MEMORANDUM ON MOTIONS FOR SUMMARY JUDGMENT—Filed October 10, 1952

This action arises under the revenue laws of the United States. It is brought by the United States to recover taxes from defendant, Michael P. Acri, and to establish priority of the Government's lien upon property of Acri in a safety deposit box at The Dollar Savings and Trust Company of Youngstown, Ohio. Defendant Edward Oravitz, a judgment creditor of Acri, by cross petition claims a prior lien. The Government and Oravitz each move for summary judgment.

The facts controlling disposition of the motions for summary judgment have been stipulated by the parties and briefly may be stated as follows:

On August 6, 1947, defendant Oravitz as administrator of the estate of John Oravec, deceased, filed a suit in the Common Pleas Court of Mahoning County against defendant Acri for wrongful death by murder. On the same day moneys, securities, and property of Acri in the safety deposit box at The Dollar Savings and Trust Company were attached, this suit proceeded to trial and a judgment for Oravitz in the amount of \$18,500 was entered on January 19, 1949.

The Commissioner of Internal Revenue, meanwhile, had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector on November 19, 1947, and demand for payment was mailed to Acri on November 19, 1947. Thereafter, on November 21, 1947, a notice of tax lien was filed in the office of the Recorder of Mahoning County. On the same date notice of tax lien and notice of levy were served upon The Dollar Savings and Trust Company.

On June 14, 1948, The Dollar Savings and Trust Company was appointed guardian of the estate of Michael P. Acri who had been incarcerated on his conviction for the murder of Oravec. The Bank inventoried the contents of Acri's safety deposit box on September 11, 1948. Currency in the sum of \$35,821 and bonds having a total maturity value of \$8,675 were found. No one had been allowed access to the box from the time of the attachment until the inventory was taken.

Considering first the question of defendant Acri's alleged tax liability in the sum of \$71,543.82, summary judgment on this issue must be denied.

There is no admission by either defendant Oravitz, Acri, or the guardian of his estate that the taxes are owing, although they had been assessed. The Dollar Savings and Trust Company as guardian of Acri's estate denies any tax liability

in paragraph three of its answer. While it stipulates that the only issue in this action is the question of priority of liens, an intent to admit the tax liability legally can not be attributed to it in the face of its denial in its answer. Acri, though presently incarcerated, is not "non compos mentis," and is capable of advising his counsel respecting his tax liability.

The jurisdiction of the court to determine the question of the priority of the liens is challenged. Controlling authorities make it clear, however, that the court has jurisdiction. *Markham v. Allen*, 326 U. S. 490; *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613; *Wilhoit v. Federal Deposit Insurance Corp.*, 143 F. 2d 14, 6 Cir.

The property subject to the present liens is constructively in the custody of the state court by reason of the attachment. While a federal court may not disturb or affect the possession of property in the custody of a state court, *Markham v. Allen*, *supra*; *U. S. v. Bank of New York*, 296 U. S. 459, it may nevertheless adjudicate rights in such property when the final judgment does not interfere with the state court's possession save to the extent that the state court is found by the judgment to recognize the right adjudicated by the federal court." *Markham v. Allen*, *supra*.

Respecting the priority of the several liens, the Supreme Court has held that the effect and operation of a state lien in relation to a claim of priority by the United States is a federal question. *Illinois v. Campbell*, 329 U. S. 362; *U. S. Security Trust & Savings Bank*, 340 U. S. 47. The federal court must determine whether the lien under state law is sufficiently specific and perfected to defeat the Government's priority, and in making such determination it should give weight to the state court's characterization of the lien, although such characterization is not conclusive. *Illinois v. Campbell*, *supra*; *U. S. v. Security Trust and Savings Bank*, *supra*.

19 Here the Ohio law allowed, and the Ohio court awarded, on January 19, 1949, a lien by virtue of defendant Oravitz' attachment levied upon the specific property of the defendant Acri, to-wit: Moneys, and bonds of Acri contained in a certain safety deposit box No. 710 of the defendant The Dollar Savings and Trust Company, guardian of Acri's estate. Ohio General Code Sections 11819, 11837; Journal Entry, Court of Common Pleas for Mahoning County, Defendant's Exhibit A attached to his answer and cross petition.

Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837. *Illinois v. Campbell*, *supra*.

The subsequent receipt of the assessment list by the Collector and the filing of an income tax lien by him accords the Government's lien only second place. 26 U. S. C. Section 3671.

The case of *U. S. v. Security Trust and Savings Bank*, *supra*, relied upon by the Government, dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute.

The Ohio courts have characterized the attachment lien under Ohio law as an "execution in advance," *Rempe & Son v. Ravens*, 68 O. S. 113; *Green v. Coi*, 81 O. S. 280, and accord it equal standing with an execution lien. *Shorten v. Drake*, 38 O. S. 76. Thus they treat the attachment lien as perfected at the time the attachment is made.

In the interest of orderly administration of justice in matters of concurrent jurisdiction, this Court should respect the state court's characterization of the attachment lien under Ohio law.

Accordingly, it is the judgment of the court that the attachment lien of defendant Oravitz is superior to the tax lien of the United States. Consequently, the motion for summary judgment in respect of priority of the lien of the Government must be denied, and summary judgment in that respect on the cross petition of defendant Oravitz is granted.

20 Even if the court were of the opinion that there was priority in the tax lien of the Government as against the attachment lien, full summary judgment could not be granted in view of the undetermined issue of the validity and the amount of the assessment.

.....  
United States District Judge.

October 10, 1952.

#### IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed November 6, 1952.

• • • • •

After full consideration of the pleadings, Stipulation of Facts, the Motions for Summary Judgement and the briefs in support thereof, filed by the parties to this cause, the Court makes the following Findings of Fact:

(1) On August 6, 1947, defendant Oravitz, as administrator of the estate of John Oravec, deceased, filed a suit in the Common Pleas Court of Mahoning County, Ohio against defendant Acri for wrongful death by murder; the same being entitled *Edward Oravitz, Administrator of the estate of John Oravec, a.k.a. Oravitz, deceased vs. Michael Acri*, No. 124893.

(2) On August 5, 1947, monies, securities and property of Acri in his safety box at The Dollar Savings & Trust Company were attached by Oravitz as administrator of the estate of John Oravec.

(3) On January 19, 1949, upon trial of this suit, a judgment for Oravitz in the sum of \$18,500 was entered.

(4) The Commissioner for Internal Revenue, meanwhile, had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector of Internal Revenue, and Demand for Payment was mailed to Acri on November 11, 1947.

(5) On November 21, 1947, a notice of tax lien was filed in the office of Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served upon The Dollar Savings & Trust Company.

(6) On June 14, 1948, the Dollar Savings & Trust Company was appointed guardian of the estate of Michael P. Acri, who had been incarcerated upon his conviction for the murder of Oravec.

(7) On September 11, 1948, the bank inventoried the contents of Acri's safety deposit box, and currency in the sum of \$35,821, and bonds having a total maturity value of \$8,675 were found therein.

(8) No one had been allowed access to the said safety deposit box from the time of attachment, August 6, 1947, by defendant Oravitz until said inventory was taken.

(9) No admission is made by either defendant Oravitz, Acri, or the guardian of his estate that the taxes are owing, although they had been assessed. The Dollar Savings & Trust Company, as guardian of Acri's estate, denies any tax liability in paragraph No. 3 of its answer, while it stipulates that the only issue on this action is the question of priority of liens. Acri, though presently incarcerated, is not "non compos mentis" and is capable of advising his counsel respecting his tax liability.

#### CONCLUSIONS OF LAW

(1) The jurisdiction of this Court to determine the priority of the liens is challenged. Controlling authorities make it clear that this Court has jurisdiction. *Markham vs. Allen*, 326 U. S. 490; *Commonwealth Trust Company vs. Bradford*, 297 U. S. 613; *Wilhoit vs. Federal Deposit Insurance Corp.*, 143 F. 2d 14, 6 Cir. While a Federal Court may not disturb or affect the possession of property in the custody of a State Court (*Markham vs. Allen*, *supra*; *U. S. vs. Bank of New York*, 296 U. S. 459), it may, nevertheless, "adjudicate rights in such property when the final judgment does not interfere with the State Court's possession, save to the extent that the State Court is bound by the judgment to recognize the right adjudicated by the Federal Court." *Markham vs. Allen*, *supra*.

(2) Respecting the priority of the several liens, the Supreme Court has held that the effect and operation of a state lien in re-

lation to a claim of priority by the United States is a Federal question. *Illinois vs. Campbell*, 329 U. S. 362; *U. S. vs. Security Trust & Savings Bank*, 340 U. S. 47.

(3) The Federal Court must determine whether the lien under State law is sufficiently specific and perfected to defeat the Government's priority, and in making such determination, it should give weight to the State Court's characterization of the lien, although such characterization is not conclusive. *Illinois vs. Campbell*, *supra*; *U. S. vs. Security Trust & Savings Bank*, *supra*.

(4) In this case, the Ohio law allowed and the Ohio Court awarded, on January 19, 1949, a lien by virtue of defendant Oravitz' attachment levied upon the specific property of the defendant Acri, to-wit: monies and bonds of Acri contained in a certain safety deposit box No. 710 of the defendant, The Dollar Savings & Trust Company, guardian of Acri's estate. Ohio General Code Sections 11819, 11837; Journal Entry, Court of Common Pleas for Mahoning County, defendant's Exhibit A, attached to his answer and cross-petition.

(5) Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837; *Illinois vs. Campbell*, *supra*.

(6) The case of the *U. S. vs. Security Trust & Savings Bank*, *supra*, relied upon by the Government, dealt with a California statute giving no such effectiveness to attachment proceedings and liens, as does the Ohio statute.

23 (7) The Ohio Courts have characterized the attachment lien under Ohio law as an "execution in advance," *Rempe & Son v. Ravens*, 68 O. S. 113; *Green v. Coit*, 81 O. S. 76, and accord it equal standing with an execution lien. *Shorten v. Drake*, 38 O. S. 76. Thus they treat the attachment lien under Ohio law. Accordingly, under the law and the facts, it is the judgment of the Court that the attachment lien of the defendant Oravitz is superior to the tax lien of the United States.

(8) The Motion for Summary Judgment, in respect of priority of the lien of the Government, must be denied and summary judgment in that respect on the cross-petition of the defendant Oravitz is granted, and judgments may be entered accordingly.

JONES, J.

Proposed by: JOHN A. WILLO,  
FRANCIS B. KAVANAGH,  
I. FREEMAN,  
*Attorneys for Defendant Oravitz.*

I herewith certify that on the .... day of ....., 1952, I personally served a copy of the above Finding of Fact and Conclusions

of Law on John J. Kane, United States Attorney for the Northern District of Ohio, 300 Federal Bldg., Cleveland, Ohio.

.....  
JOHN A. WILLO.

In United States District Court

JUDGMENT ENTRY—Entered December 18, 1952

This cause came on to be heard by the Court on the pleadings, Stipulation of Facts, and the Motions of the respective parties for Summary Judgment, supported by their briefs.

24 After full consideration to the questions involved, the Court determines and finds that the lien of the defendant Oravitz is a valid lien of the requisite specificity on the monies and property of the defendant Acri in the custody of The Dollar Savings & Trust Company of Youngstown, Ohio, guardian, as of the date of the commencement of the action and attachment proceedings in the Court of Common Pleas, Mahoning County, Ohio, on and as of August 6, 1947, under and by virtue of Ohio General Code provisions Sections 11837 and 11819; and the Court further determines and finds that the attachment lien of the defendant Oravitz is superior to the tax lien of the United States of America,

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the Motion for Summary Judgment in respect of the priority of the lien of the United States is denied; and that Summary Judgment in that respect, on the cross-petition of the defendant Oravitz, is granted; judgment is entered accordingly, without cost.

\_\_\_\_\_  
*United States District Judge.*

Date:

.....

NOTES See Findings of Fact and  
Conclusions of Law

In United States District Court

NOTICE OF APPEAL—Filed February 12, 1953

Now comes the plaintiff, United States of America, by John J. Kane, Jr., United States Attorney for the Northern District of Ohio, and Frank E. Steel, Assistant United States Attorney, and upon recommendation and request of the Attorney General 25-28 herein files its notice of appeal from the decision of the Court as heretofore entered on December 18, 1952, for the following reasons:

1. The District Court erred in overruling the motion of the plaintiff, United States of America, for summary judgment.

2. The Court erred in granting the motion on the pleadings of the defendant Edward Oravitz, Administrator of the Estate of John Oravec, aka Oravitz, deceased.

3. The findings of fact as set forth in the Court's Opinion do not support the judgment or the Court's conclusions of law set forth in its Opinion.

4. The judgment as entered in the case is contrary to law.

5. The judgment as entered in the case is not supported by the evidence.

JOHN J. KANE, JR.,  
*United States Attorney.*  
By: FRANK E. STEEL,  
*Assistant United States  
Attorney.*

29 In United States Court of Appeals

APPENDIX TO APPELLEE'S BRIEF—Filed October 9, 1953

APPENDIX A (ADDITIONAL PORTIONS OF RECORD).

In United States District Court

DEFENDANT'S EXHIBIT A.

Judgment of Common Pleas Court in the Case of Oravitz v. Acri.

No. 124,893.

THE COURT OF COMMON PLEAS

THE STATE OF OHIO, COUNTY OF MAHONING, ss:

EDWARD ORAVITZ,  
administrator of the estate of John Oravec,  
a.k.a. Oravitz, deceased,  
(Plaintiff),

vs.

MICHAEL ACRI,  
(Defendant).

JOURNAL ENTRY.

This day this cause came on for trial, and a jury being orally waived in open court by the plaintiff and the defendant, was submitted upon the petition of the plaintiff, the answer of the defendant, evidence and arguments of counsel.

On consideration thereof, and the Court being fully advised in the premises, finds on the issue joined for the plaintiff, and that by reason of the premises, the plaintiff is entitled to recover damages from the defendant.

The Court further finds that the assault by the defendant, upon the late John Oravec, which resulted in the death of John Oravec, as alleged in the petition, was without provocation and  
30 justification, and was wrongful, malicious and unlawful.

And thereupon, the Court assesses said damages at Eighteen Thousand Five Hundred (\$18,500.00) Dollars.

IT IS THEREFORE CONSIDERED by the Court, that the plaintiff, Edward Oravitz, administrator of the estate of John Oravec, a.k.a. Oravitz, deceased, recover from the defendant, Michael Acri, the said sum of Eighteen Thousand Five Hundred (\$18,500.00) Dollars, together with his costs.

THE COURT FURTHER FINDS that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Company of Youngstown, Ohio; that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947 and for the full payment and satisfaction of the judgment entered herein.

H. B. DOYLE,  
*Judge.*

APPROVED BY:

JOHN A. WILLO,  
*Attorney for Plaintiff.*  
W. P. BARNUM,  
*Attorney for Defendant.*

31

#### PLAINTIFF'S EXHIBIT 1

#### Notice of Tax Lien Under Internal Revenue Laws

No. 5619

UNITED STATES INTERNAL REVENUE  
18TH DISTRICT OF OHIO

November 21, 1947

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer,

taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer MICHAEL ACRI.

Residence or place of business—1341 Oak Street, Youngstown, Ohio.

Nature of Tax	Year or Taxable Period Ended	Date Assessment List Received	Amount of Assessment
Income	1944 Wash Addl.	79,551.80	79,551.80
Total			79,551.80

THOS. M. CAREY, *Collector*,

By /s/ W. J. CHAMPION,

*Assistant Collector.*

CERTIFICATE OF OFFICER AUTHORIZED BY LAW TO TAKE  
ACKNOWLEDGMENTS

STATE OF OHIO,

County of Cuyahoga, ss:

Before me, this day personally appeared Thos. M. Carey, Collector, by W. J. Champion, to me well known, and well known  
32 by me to be the person described in and who executed the foregoing instrument as Assistant Collector of Internal Revenue for the 18th Collection District of Ohio; and he acknowledged before me that he executed the same as such Assistant Collector of Internal Revenue, and for the purpose herein expressed.

WITNESS my hand and official seal at Cleveland, in the County and State aforesaid, this 21 day of November, 1947.

/s/ ETHEL GAVAN, *Notary Public.*

My Commission expires 1-16-50.

To Recorder, Mahoning County,  
Youngstown, Ohio.

[SEAL]

33

## PLAINTIFF'S EXHIBIT 2

## Notice of Levy

Served on: R. W. Dickey, Comptroller

Date Served: November 21, 1947

Time Served: 2:35 p. m.

Served by: /s/ Michael T. Walsh, Dep. Coll.

/s/ Arthur M. Mellott, Spec. Agent.

## UNITED STATES OF AMERICA

## 18TH COLLECTION DISTRICT, STATE OF OHIO

To The Dollar Savings & Trust Co.  
At Youngstown, Ohio.

You are hereby notified that there is now due, owing, and unpaid from Michael Acri to the United States of America the sum of Seventy nine thousand five hundred fifty one & 80/100 dollars (\$79,551.80) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Michael Acri and all sums of money owing from you to the said Michael Acri are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Seventy nine thousand five hundred fifty one and 80/100 dollars (\$79,551.80) of the amount now owing from you to the said Michael Acri or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Cleveland, Ohio this 21 day of November, 1947.

THOS. M. CAREY, *Collector*,

By: /s/ W. J. CHAMPION,

*Assistant Collector of Internal Revenue.*

34

## APPENDIX B (STATUTES)

Page's Ohio General Code:

SEC. 11819. *Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

• • • • •

(10) Has fraudulently or criminally contracted the debt or incurred the obligations for which suit is about to be or has been brought; \* \* \*

. . . . .

SEC. 11837. *When property and garnishee bound.* An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, *from the time he is served with the written notice hereinbefore mentioned.* But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. Sec. 5538.) (Emphasis ours.) California Code, Section 542 (a):

The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated. \* \* \*

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the filing with the recorder of an abstract of the judgment in the action.

### 35 Internal Revenue Code:

#### SEC. 3670. PROPERTY SUBJECT TO LIEN

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1946 ed., Sec. 3670.)

#### SEC. 3671. PERIOD OF LIEN

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat.

798]. VALIDITY AGAINST MORTGAGEES, PLEDGEEs, PURCHASERS AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the 36-38 State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia. (26 U. S. C. 1946 ed., Sec. 3672.)

39-40 ARGUMENT AND SUBMISSION—December 10, 1953 (omitted in printing)

In United States Court of Appeals for the Sixth Circuit

JUDGMENT—Filed December 17, 1953

The above cause coming on to be heard upon the record, the briefs of the parties, and the argument of counsel in open court, and the court being duly advised,

Now, therefore, it is ordered, adjudged, and decreed that the judgment of the district court be and is hereby affirmed in accordance with the findings of fact and conclusions of law of the district court.

41-42 Clerk's Certificate to foregoing transcript omitted in printing.

43-44 In the Supreme Court of the United States, October Term,  
1953

UNITED STATES OF AMERICA, Petitioner

vs.

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., and EDWARD  
ORAVITZ, Admr. Estate of John Oravec, a.k.a., Oravitz, dec'd

STIPULATION AS TO THE PRINTING OF THE RECORD—Filed March 16,  
1954

IT IS HEREBY STIPULATED AND AGREED, by and between counsel  
for the respective parties to the above-entitled cause, that:

For the purpose of the petition for a writ of certiorari, the printed  
record shall consist of:

1. Appendices to brief for the United States, and Appendix to  
brief of Edward Oravitz, Administrator, Appellee.

2. The proceedings had before the United States Court of Appeals  
for the Sixth Circuit.

3. Clerk's certificate.

4. This stipulation.

IT IS FURTHER STIPULATED AND AGREED that petitioner will cause  
the Clerk of the United States Court of Appeals for the Sixth Cir-  
cuit to certify and file with the Clerk of the Supreme Court of the  
United States the entire original record on appeal.

IT IS FURTHER STIPULATED AND AGREED that any of the parties  
may refer in their briefs and argument to the record filed in the  
Supreme Court of the United States, including any part thereof  
which has not been printed.

ROBERT L. STERN,  
*Acting Solicitor General,*  
*Counsel for petitioner.*

JOHN A. WILLS,  
*Counsel for respondents.*

February, 1954.

45 [File endorsement omitted.]

46 Supreme Court of the United States, October Term, 1953

No. 641

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed May 24, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted. The case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

**LIBRARY**  
**SUPREME COURT, U. S.**

Office - Supreme Court, U. S.

U. S. DEPT. OF JUSTICE

MAR 16 1964

HAROLD E. WILLEY, Clerk

No. ~~22~~ 23

**In the Supreme Court of the United States**

**October Term, 1963**

**UNITED STATES OF AMERICA, PETITIONER**

**vs.**  
**NICHOLAS P. ADAMS, DALLAS SAVINGS & TRUST COMPANY,**  
**and DALLAS SAVINGS & TRUST COMPANY**  
**as Respondents, (Joint Guardians of the Estate**  
**of ADAMS, a Deceased, and EDWARD ADAMS,**  
**Respondents of the Estate of JOHN ADAMS,**  
**Deceased, Defendants)**

**and**  
**ADAMS, a Deceased, and EDWARD ADAMS,**  
**Respondents of the Estate of JOHN ADAMS,**  
**Deceased, Defendants)**

# INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of error to be urged	5
Reasons for granting the writ	5
Conclusion	10
Appendix	12

## CITATIONS

### Cases:

<i>Sunnyland Wholesale F. Co. v. Liverpool &amp; London, etc.</i> , 107 F. Supp. 405, affirmed, <i>sub nom. United States v. Liverpool &amp; London &amp; Globe Ins. Co.</i> , decided Decem- ber 22, 1953	10
<i>United States v. Albert Holman Lumber Co.</i> , 206 F. 2d 685, rehearing denied, 208 F. 2d 113	10
<i>United States v. City of New Britain</i> , 347 U. S. 81	5, 7, 9
<i>United States v. Gilbert Associates</i> , 345 U. S. 361	9
<i>United States v. Griffex-Moore Lumber Co.</i> , 62 So. 2d 589	10
<i>United States v. Scovil</i> , 78 S. E. 2d 277	10
<i>United States v. Security Trust and Savings Bank</i> , 340 U. S. 47	5, 6, 7, 8, 9
<i>United States Fidelity &amp; Guaranty Co. v. United States</i> , 201 F. 2d 118	10

### Statutes:

#### Internal Revenue Code:

Sec. 3670 (26 U. S. C. 1946 ed., Sec. 3670)	5, 6, 12
Sec. 3671 (26 U. S. C. 1946 ed., Sec. 3671)	6, 12
Sec. 3672 (26 U. S. C. 1946 ed., Sec. 3672)	6, 12

#### Page's Ohio General Code, Annotated (1938):

Sec. 11819	9, 13
Sec. 11820	9, 14
Sec. 11826	9, 14
Sec. 11827	9, 14
Sec. 11828	9, 15
Sec. 11836	9, 15
Sec. 11837	8, 9, 16
Sec. 11843	9, 16

## II

### Statutes—Continued

### Page

#### Page's Ohio General Code, Annotated (1938)—Con.

Sec. 11847.....	9, 16
Sec. 11848.....	9, 17
Sec. 11850.....	9, 18
Sec. 11853.....	8, 9, 18
Sec. 11854.....	8, 9, 18
Sec. 11855.....	8, 9, 19

# **In the Supreme Court of the United States**

OCTOBER TERM, 1953

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No. 641

UNITED STATES OF AMERICA, PETITIONER

*v.*

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST COMPANY, THE DOLLAR SAVINGS & TRUST COMPANY OF YOUNGSTOWN, OHIO, GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, AND EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF JOHN ORAVEC, A. K. A., ORAVITZ, DECEASED

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

---

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Sixth Circuit in this case.

## **OPINIONS BELOW**

The District Court's memorandum on motions for summary judgment (I R. 16a-20a) is reported at 109 F. Supp. 943. The *per curiam* affirmance of the Court of Appeals (II R. 9) is reported at 209 F. 2d 258.

**JURISDICTION**

The judgment of the Court of Appeals (II R. 9) was entered December 17, 1953. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

**QUESTION PRESENTED**

Whether certain tax liens held by the United States were subordinate to an inchoate attachment-before-judgment lien accorded by state law to the plaintiff in a civil action, where the federal tax liens arose and were recorded subsequent to the attachment but prior to the entry of judgment in the civil case.

**STATUTES INVOLVED**

The pertinent provisions of the Internal Revenue Code and of the Ohio General Code are printed in the Appendix, *infra*, pp. 12-19.

**STATEMENT**

This action was brought by the United States in the United States District Court for the Northern District of Ohio to collect federal income taxes assessed against Michael P. Aeri (herein sometimes referred to as the taxpayer) for the years 1942 to 1946, inclusive, and to foreclose the liens of the United States for such unpaid taxes against the taxpayer's property, including that held in a safe deposit box registered in his name at the Dollar Savings & Trust Company of Youngstown, Ohio. One Oravitz, administrator of the estate of John Oravec, was made a de-

fendant to the action because he previously had instituted a suit against the taxpayer in the Court of Common Pleas, Mahoning County, Ohio, to recover damages for the murder of the decedent by the taxpayer and had secured a writ of attachment before judgment against the personal property of taxpayer held in the above-mentioned safe deposit box. The Dollar Savings & Trust Company was also made a defendant in the action in its capacity as guardian of the estate of the taxpayer, who was incarcerated.

The material facts as stipulated by the parties (I R. 11a-15a) and as found by the District Court may be summarized as follows (I R. 20a-21a).

On August 6, 1947, Oravitz, as administrator of the estate of John Oravec, filed a suit for damages in the Court of Common Pleas of Mahoning County, Ohio, against Acri for wrongful death by murder, and on the same date the money, securities and property of Acri contained in his safe deposit box at the Dollar Savings & Trust Company were attached by Oravitz. On January 19, 1949, upon trial of that suit, a judgment for Oravitz in the sum of \$18,500 was entered. (I R. 20a.)

In the meantime, the Commissioner of Internal Revenue assessed income taxes against Acri for the years 1942 to 1946, inclusive. The assessment list covering these taxes was received by the Collector of Internal Revenue, and demand for payment was mailed to Acri on November 11, 1947.

On November 21, 1947, a notice of tax lien was filed in the office of the Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served on the Dollar Savings & Trust Company.<sup>1</sup>

On June 14, 1948, the Dollar Savings & Trust Company was appointed guardian of the estate of Aeri, who had been incarcerated upon his conviction for the murder of Oravee. On September 11, 1948, the bank inventoried the contents of Aeri's safe deposit box, and currency in the sum of \$35,821 and bonds having a total maturity value of \$8,675 were found therein. No one had been allowed access to the safe deposit box from the time of the attachment, August 6, 1947, until the inventory was taken. (I R. 12a-13a, 21a.)

It was stipulated (I R. 15a) that the only issue involved was the relative priority of the attachment lien of Oravitz and the tax liens of the United States. The case was submitted to the District Court on motions for summary judgment filed by the United States and by Oravitz.

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<sup>1</sup> The assessment of November 11, 1947, for which notice of tax lien was filed on November 21, 1947, was for the amount of \$79,551.80. Thereafter, the Commissioner determined the tax liability of Aeri for the years 1942 to 1946, inclusive, to be \$71,543.82, and on June 7, 1948, notice of lien in this reduced amount was filed with the Recorder of Mahoning County, and a second notice of levy for this amount was served on the Dollar Savings & Trust Company. (I R. 11a-12a.) The latter amount <sup>is</sup> the amount of taxes here involved.

(I R. 23a-24a.) The District Court held (I R. 16a-20a) that the attachment lien was superior to the tax liens of the United States. The Court of Appeals affirmed without opinion. (II R. 9.)

#### SPECIFICATION OF ERROR TO BE URGED

The court below erred in holding that the inchoate attachment-before-judgment lien obtained by the respondent Oravitz under the laws of Ohio was superior to the liens of the United States for unpaid taxes.

#### REASONS FOR GRANTING THE WRIT

This case presents the identical question decided by this Court in *United States v. Security Trust and Savings Bank*, 340 U. S. 47, and *United States v. City of New Britain*, 347 U. S. 81. Those cases hold that an attachment before judgment obtained in a state court under state law is no more than an inchoate lien and is, therefore, inferior to a federal tax lien established under Section 3670 of the Internal Revenue Code prior to entry of judgment in the state court proceeding. The decision of the court below is directly opposed to this Court's rulings in those cases. The problem presented here is a frequently recurring one, and it is essential to the orderly administration of the federal tax lien statute that the lower courts consistently follow and apply the principles established by this Court. Accordingly, the Govern-

ment submits that this is an appropriate case for exercise of this Court's supervisory powers of review.

1. Sections 3670 and 3671 of the Internal Revenue Code, *infra*, p. 12, vest in the United States a lien for unpaid taxes upon all property belonging to a delinquent taxpayer, the lien arising when the assessment list is received by the Collector. Section 3672 of the Internal Revenue Code, *infra*, pp. 12-13, provides that the said lien shall not be valid as against a judgment creditor until notice thereof has been filed by the Collector in one of the places designated. This case, like the *Security Trust* case, involves only the relative priority between the federal tax lien and an attachment lien accorded by the laws of the state to a plaintiff during the pendency of a law suit as security for any judgment which may be obtained in the law suit. The facts of this case are not distinguishable in any material respect from those of the *Security Trust* case. Here, as in that case, the federal tax liens arose and were recorded after the attachment lien arose, but before the attaching creditor obtained judgment.

In the *Security Trust* case this Court held that the tax liens of the United States were superior to a preexisting attachment lien created under California law. It pointed out that the attaching creditor had acquired only an "inchoate lien" because (p. 50)—

The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment \* \* \*. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists.

The Court further held (p. 50) that the attachment lien could not be deemed to have become choate as of the date of the attachment by virtue of any “doctrine of relation back” of the subsequently obtained judgment, for to apply such a doctrine would “destroy the realities of the situation.”

Recently, in the *City of New Britain* case, *supra*, this Court held that the relative priority of tax liens of the United States and liens created by state law is to be determined by the principle that “the first in time is the first in right”, and that therefore the priority of each of the competing liens there involved (federal and municipal tax liens) “must depend on the time it attached to the property in question and became choate.” Re-affirming its holding in the *Security Trust* case, and referring specifically to the attachment lien there under consideration, the Court stated:

Such inchoate liens may become certain as to amount, identity of the lienor, or the

property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time \* \* \*.

The District Court here considered the *Security Trust* case inapplicable, and awarded priority to the attachment creditor's lien, upon the theory (I R. 19a) that the Ohio courts "treat the attachment lien as perfected at the time the attachment is made." The Ohio attachment lien here involved is no more choate, however, than the California attachment lien involved in the *Security Trust* case. Under the Ohio statute, just as under the California statute, the attachment creditor has a lien which is contingent, both as to its existence and amount, upon its ripening into a judgment lien. See Ohio General Code Annotated (1937), Sections 11853-11855, *infra*, pp. 18-19.<sup>2</sup> Moreover, while a

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<sup>2</sup> An attachment under Ohio law, as under the laws of other states, is given both for the protection of the plaintiff in attachment in the event he obtains judgment in the attachment proceeding, and also for the owner of the property in the event of a judgment in his favor. Section 11837 of the Ohio General Code, *infra*, p. 16, upon which the District Court relied, provides that an order of attachment shall bind the property attached from the time of service, and that "A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is

state court's characterization of a lien as specific and perfected is entitled to weight, it is not conclusive against the federal government. *United States v. Security Trust and Savings Bank, supra*, pp. 49-50; *United States v. City of New Britain, supra*; *United States v. Gilbert Associates*, 345 U. S. 361.

It is clear that under the pertinent provisions of the Ohio statute, the attachment lien here involved, at the time the federal tax lien was established, was far from being "choate" in the sense in which this Court used those terms in *Security Trust* and *City of New Britain*, and it is equally plain that it did not acquire that status until the suit in which the attachment was made culminated in a judgment in the plaintiff's favor. Indeed, it was not until the judgment was obtained that the amount of the lien was established. In short, the crucial fact here, as in the *Security Trust* case (p. 50) is that "When the tax liens of the United States were recorded [the plaintiff] did not have a judgment lien."

2. The decision below typifies the failure of some lower courts to give effect to this Court's decision in the *Security Trust* case. See *Sunny-*  


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*served with the written notice hereinbefore mentioned.* Related provisions of the Ohio General Code (Sections 11819 to 11855, *infra*, pp. 13-19) make it clear that an attachment is intended merely to preserve the property, or proceeds of its sale in case of perishables, for the purpose of satisfying any judgment which eventually may be obtained by the plaintiff in attachment.

*land Wholesale F. Co. v. Liverpool & London, etc.*, 107 F. Supp. 405 (N. D. Tex.), affirmed *sub nom. United States v. Liverpool & London & Globe Ins. Co.*, by the Court of Appeals for the Fifth Circuit on December 22, 1953 (1954 C. C. H., par. 9132), and *United States v. Scovit*, 78 S. E. 2d 277 (S. C.), in which petitions for certiorari are also being filed on behalf of the Government. See also *United States v. Albert Holman Lumber Co.*, 206 F. 685 (C. A. 5), rehearing denied, 208 F. 2d 113 (C. A. 5); *United States v. Griffin-Moore Lumber Co.*, 62 So. 2d 589 (Fla.); *United States Fidelity & Guaranty Co. v. United States*, 201 F. 2d 118, 121 (C. A. 10).

Uniformity and stability in the administration of the federal tax lien statute are unattainable without adherence by the lower courts to the rulings of this Court. Numerous cases involving adverse liens of various kinds are pending in lower courts, both state and federal. To allow the decision below to stand would accord inchoate liens created by some of the states a preference over the federal tax lien not enjoyed by like liens created by other states, and would invite further departures from the controlling principles declared by this Court.

#### CONCLUSION

The basic facts upon which this case turns are not in controversy, and the sole question of law presented has already been authoritatively re-

solved by this Court. The petition for a writ of certiorari should, therefore, be granted and the decision of the court below reversed, without further briefs or argument, in order that the rulings in the Sixth Circuit on this recurring problem may be brought into harmony with the law as settled by this Court.

Respectfully submitted,

SIMON E. SOBELOFF,  
*Solicitor General.*

MARCH 1945.

## APPENDIX

### Internal Revenue Code:

#### SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1946 ed., Sec. 3670.)

#### SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1946 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEEs, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such

notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

\* \* \* \* \*

(26 U. S. C. 1946 ed., Sec. 3672.)

Page's Ohio General Code, Annotated (1938):

SEC. 11819. *Grounds of attachment.*—In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

\* \* \* \* \*

(6) Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

\* \* \* \* \*

(8) Has property or rights in action, which he conceals;

\* \* \* \* \*

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; \* \* \*

\* \* \* \* \*

SEC. 11820. *Affidavit for order of attachment; contents.*—An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing;

- (1) The nature of the plaintiff's claim;
- (2) That it is just;
- (3) The amount which the affiant believes the plaintiff ought to recover; and
- (4) The existence of any one of the grounds for an attachment enumerated in such section.

\* \* \* \* \*

SEC. 11826. *How order executed.*—The sheriff shall execute the order of attachment without delay. He shall go to the place where the defendant's property is, and there, in the presence of two freeholders of the county, declare that, by virtue of the order, he attaches the property at the suit of the plaintiff. Then with the freeholders, who must be first sworn by him, he shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and freeholders, and returned with the order. When the property attached is real property, the officer shall leave with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order. When it is personal property, and can be come at, he shall take it into

his custody, and hold it subject to the order of the court. (R. S. Sec. 5528.)

SEC. 11827. *When property may be delivered to persons with whom found.*—The sheriff shall deliver the property attached to the person in whose possession it was found, upon his executing, in the presence of the sheriff, a bond to the plaintiff, with sufficient surety, resident in the county, to the effect that the parties to it are bound, in double the appraised value of the property, that it or its appraised value in money will be forthcoming to answer the judgment of the court in the action. If it appears to the court that any part of such property has been lost or destroyed by unavoidable accident, the value thereof must be remitted to the person so bound. (R. S. Sec. 5529.)

SEC. 11828. *Service of garnishee.*—When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. Sec. 5530.)

SEC. 11836. *Form of return.*—The officer shall return upon every order of attachment what he has done under it. The return must show the property attached

and the time it was attached. When garnishees are served, their names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. Sec. 5537.)

SEC. 11837. *When property and garnishee bound.*—An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. Sec. 5538.)

SEC. 11843. *How attached property disposed of.*—The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as are provided in respect to money deposited in lieu of bail. (R. S. Sec. 5544.)

SEC. 11847. *Appearance and answer of garnishee.*—After the written notice is is-

sued as hereinbefore provided, the garnishee shall appear and answer within the time allowed the defendant or defendants to answer the petition upon which the attachment was granted. Under oath, he shall answer all questions put to him touching property of every description, and credits of the defendant in his possession or under his control and truly disclose the amount owing by him to the defendant, whether due or not in the case of a corporation, any stock held therein by or for the benefit of the defendant, at or after the service of notice. (R. S. Sec. 5547.)

SEC. 11848. *Garnishee may pay money into court or to sheriff.*—A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs. When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in force from the time of its service until the trial of the cause to determine the claim, debt or demand of the creditor and bind all such earnings due at the time of service, and which will become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any

liability to such creditor therefor. (R. S. Sec. 5548.)

SEC. 11850. *Disposition of property in hands of garnishee.*—If the garnishee appears and answers and on his examination it be discovered that at or after, the service of the order of attachment and notice upon him, he was possessed of property of the defendant, and was indebted to him, or either, the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs. (R. S. Sec. 5550.)

SEC. 11853. *Judgment against garnishee.*—Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. Sec. 5553.)

SEC. 11854. *Judgment for defendant.*—If the judgment in the action be rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds returned to him. (R. S. Sec. 5554.)

SEC. 11855. *Proceedings after judgment for plaintiff.*—If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property, and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and execution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant. (R. S. Sec. 5555.)

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# In the Supreme Court of the United States

OCTOBER TERM, 1954

UNITED STATES OF AMERICA, PETITIONER

v.

MICHAEL P. ACRI, DOLLAR SAVINGS AND TRUST  
COMPANY, THE DOLLAR SAVINGS AND TRUST COM-  
PANY OF YOUNGSTOWN, OHIO, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SIXTH CIRCUIT

## BRIEF FOR THE UNITED STATES

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## INDEX

	Page
Opinions below .....	1
Jurisdiction .....	1
Question presented .....	2
Statutes involved .....	2
Statement .....	2
Summary of argument .....	5
Argument:	
A lien of the United States for its unpaid taxes is superior to a prior inchoate lien based on an attachment before judgment under state law which is dependent for its perfection upon the obtaining of a judgment and the issuance of execution in the related civil action.....	8
Conclusion .....	28
Appendix .....	29

## CITATIONS

### Cases:

<i>Burk-Waggoner Assn. v. Hopkins</i> , 269 U. S. 110....	24
<i>Burnet v. Harmel</i> , 287 U. S. 103.....	24
<i>Campbell v. Park</i> , 32 Ohio St. 544.....	23
<i>Capital Foundry Corp., In re</i> , 64 F. Supp. 885.....	9
<i>Capitol Cleaners &amp; Dyers, In re</i> , 233 P. 2d 377....	9
<i>Commonwealth Co. v. Bradford</i> , 297 U. S. 613....	11
<i>Field v. United States</i> , 9 Pet. 182.....	24
<i>Florida v. Mellon</i> , 273 U. S. 12.....	24
<i>Green v. Coit</i> , 81 Ohio St. 280.....	15, 19
<i>Guaranty Trust Co. v. United States</i> , 304 U. S. 126	24
<i>Illinois v. Campbell</i> , 329 U. S. 362...11, 12, 14, 21, 23, 25	
<i>Kennedy v. Byers</i> , 107 Ohio St. 90.....	21
<i>MacKenzie v. United States</i> , 109 F. 2d 540.....	9, 12
<i>Markham v. Allen</i> , 326 U. S. 490.....	11
<i>McCulloch v. Maryland</i> , 4 Wheat. 316.....	24
<i>Miller v. Bank of America N.T. &amp; S.A.</i> , 166 F. 2d 415 .....	9, 12
<i>Montanari v. Haworth</i> , 108 Ohio St. 8.....	14
<i>Morgan v. Commissioner</i> , 309 U. S. 78.....	24
<i>New York v. Maclay</i> , 288 U. S. 290.....	12

Cases—Continued

	Page
<i>Porter v. Pico</i> , 55 Cal. 165.....	19
<i>Rempe &amp; Son v. Ravens</i> , 68 Ohio St. 113.....	18
<i>Republic Nat. Life Ins. Co. v. Hedstrom</i> , 346 Ill. App. 555.....	9
<i>Samms v. Chicago Title &amp; Tr. Co.</i> , 349 Ill. App. 413	9
<i>Shorten v. Drake</i> , 38 Ohio St. 76.....	19
<i>Stanley v. Schwalby</i> , 147 U. S. 508.....	24
<i>United States v. Eisinger Mill &amp; Lumber Co.</i> , 202 Md. 613.....	9
<i>United States v. Gilbert Associates</i> , 345 U. S. 361..	9, 12
<i>United States v. Nashville &amp;c., R'y Co.</i> , 118 U. S. 120 .....	24
<i>United States v. New Britain</i> , 347 U. S. 81, 5, 7, 8, 18, 21, 24, 25, 26	
<i>United States v. Reese</i> , 131 F. 2d 466.....	9
<i>United States v. Security Tr. &amp; Sav. Bk.</i> , 340 U. S. 47.....	5, 6, 7, 8, 9, 10, 13, 14, 18, 19, 20, 23, 27
<i>United States v. Snyder</i> , 149 U. S. 210.....	24, 25
<i>United States v. Summerlin</i> , 310 U. S. 414.....	24
<i>United States v. Texas</i> , 314 U. S. 480.....	22
<i>United States v. Thompson</i> , 98 U. S. 486.....	24
<i>United States v. Waddill Co.</i> , 323 U. S. 353.....	11, 19, 22
<i>Wilhoit v. Federal Deposit Ins. Corp.</i> , 143 F. 2d 14	21
<i>Winther v. Morrison</i> , 93 Cal. App. 2d 608.....	10, 19

Statutes:

Deering's California Code of Civil Procedure (1941 ed.):

Sec. 537 .....	14
Sec. 542a .....	15

Internal Revenue Code of 1939:

Sec. 3670 (26 U.S.C. 1952 ed., Sec. 3670) .....	5, 8, 9, 25, 29
Sec. 3671 (26 U.S.C. 1952 ed., Sec. 3671) .....	8, 29
Sec. 3672 (26 U.S.C. 1952 ed., Sec. 3672) .....	5, 9, 29

Internal Revenue Code of 1954 (P.L. 591, 83d Cong., 2d Sess.):

Sec. 6321 .....	26
Sec. 6322 .....	26
Sec. 6323 .....	26

## Statutes—Continued

	Page
9 Page's Ohio General Code, Annotated (1938):	
Secs. 10507-1 <i>et seq.</i> .....	23
Sec. 10507-15 .....	23
Sec. 10509-166 .....	13, 20
Sec. 11819 .....	13, 14, 30
Sec. 11820 .....	31
Sec. 11826 .....	15, 32
Sec. 11827 .....	15, 32
Sec. 11828 .....	16, 33
Sec. 11836 .....	33
Sec. 11837 .....	12, 13, 14, 24, 34
Sec. 11843 .....	34
Sec. 11845 .....	14
Sec. 11847 .....	16, 35
Sec. 11848 .....	16, 35
Sec. 11850 .....	16, 17, 36
Sec. 11851 .....	17
Sec. 11853 .....	17, 36
Sec. 11854 .....	17, 37
Sec. 11855 .....	17, 37
Revised Statutes, Sec. 3466 (31 U.S.C. 1952 ed., Sec. 191) .....	25

## Miscellaneous:

H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406- A407 .....	26
S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576 ..	26

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ON WRIT OF CERTIORARI TO THE UNITED STATES  
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BRIEF FOR THE UNITED STATES

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## OPINIONS BELOW

The District Court's memorandum on motions for summary judgment (R. 12-14) is reported at 109 F. Supp. 943. The *per curiam* affirmance by the Court of Appeals (R. 23) is reported at 209 F. 2d 258.

## JURISDICTION

The judgment of the Court of Appeals (R. 23) was entered December 17, 1953. The petition for a writ of certiorari was filed on March 16, 1954, and

was granted May 24, 1954 (R. 25). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

#### QUESTION PRESENTED

Whether certain tax liens held by the United States were subordinate to an inchoate attachment-before-judgment lien accorded by state law to the plaintiff in a civil action, where the federal tax liens arose and were recorded subsequent to the attachment but prior to the entry of judgment in the civil case.

#### STATUTES INVOLVED

Sections 3670, 3671, and 3672(a) of the Internal Revenue Code of 1939, and the pertinent parts of Sections 11819, 11820, 11826, 11827, 11828, 11836, 11837, 11843, 11847, 11848, 11850, 11853, 11854, and 11855 of Page's Ohio General Code Annotated (1938), are set forth in the Appendix, *infra*, pp. 29-38.

#### STATEMENT

This action was brought by the United States in the United States District Court for the Northern District of Ohio to collect federal income taxes assessed against Michael P. Aeri (herein sometimes referred to as the taxpayer) for the years 1942 to 1946, inclusive, and to foreclose the liens of the United States for such unpaid taxes against the taxpayer's property, including that held in a safe deposit box registered in his name at the Dollar Savings & Trust Company of Youngstown, Ohio. One Oravitz, administrator of the estate of John Oravec, deceased, was made a defendant to the

action because he previously had instituted a suit against the taxpayer in the Court of Common Pleas, Mahoning County, Ohio, to recover damages for the murder of the decedent by the taxpayer and had secured a writ of attachment before judgment against the personal property of the taxpayer held in the above-mentioned safe deposit box. The Dollar Savings & Trust Company also was made a defendant in the action in its capacity as guardian of the estate of the taxpayer, who was incarcerated.

The material facts as stipulated by the parties (R. 8-11), and as found by the District Court (R. 14-15), may be summarized as follows:

On August 6, 1947, Oravitz, as administrator of the estate of John Oravec, deceased, filed a suit for damages in the Court of Common Pleas of Mahoning County, Ohio, against Acri for wrongful death by murder, and on the same date the money, securities and property of Acri contained in his safe deposit box at the Dollar Savings & Trust Company were attached by Oravitz. On January 19, 1949, upon trial of that suit, a judgment for Oravitz in the sum of \$18,500 was entered. (R. 9, 14-15.)

In the meantime, after issuance to Oravitz of the writ of attachment but more than a year before Oravitz procured a judgment, federal tax liens arose and notice thereof was duly filed covering all of Acri's property. These liens arose from income taxes assessed by the Commissioner of Internal Revenue against Acri for the years 1942 to 1946, inclusive. The assessment list covering these taxes

was received by the Collector of Internal Revenue on November 18, 1947 (R. 11), and demand for payment was mailed to Acri on November 19, 1947 (R. 8). On November 21, 1947, a notice of tax lien was filed in the office of the Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served on the Dollar Savings & Trust Company. (R. 8.)<sup>1</sup> This action to foreclose the federal tax lien was commenced on August 11, 1948. (R. 6.)

On June 14, 1948, the Dollar Savings & Trust Company was appointed guardian of the estate of Acri, who had been incarcerated upon his conviction for the murder of Oravec. On September 11, 1948, the bank inventoried the contents of Acri's safe deposit box, and currency in the sum of \$35,821 and bonds having a total maturity value of \$8,675 were found therein. No one had been allowed access to the safe deposit box from the time of the attachment, August 5, 1947, until the inventory was taken. (R. 9-10.)

It was stipulated (R. 10) that the only issue involved was the relative priority of the attachment lien of Oravitz and the tax liens of the United

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<sup>1</sup> The assessment of November 18, 1947, was in the amount of \$79,551.80. Thereafter, the Commissioner determined the correct tax liability of Acri for the years 1942 to 1947, inclusive, to be \$71,543.82, which is the amount here involved, and on June 7, 1948, but still prior to the adverse judgment, notice of lien in this reduced amount was filed with the Recorder of Mahoning County, and a second notice of levy for this amount was served on the Dollar Savings & Trust Company. (R. 8-9.)

States. The case was submitted to the District Court on motions for summary judgment filed by the United States and by Oravitz. (R. 12, 14.) The District Court held (R. 12-17) that the attachment lien was superior to the tax liens of the United States. The Court of Appeals affirmed without opinion. (R. 23.)

#### SUMMARY OF ARGUMENT

Determination of the issue here involved is controlled by this Court's decision in *United States v. Security Tr. & Sav. Bk.*, 340 U. S. 47, the principle of which was reaffirmed in *United States v. New Britain*, 347 U. S. 81. The instant case involves the same essential facts and the same issue of law as the *Security Trust* case. In each of the cases, liens were acquired by the United States under Section 3670 of the Internal Revenue Code of 1939 against all of the property and rights to property of a delinquent taxpayer by reason of assessments of federal taxes. The assessment lists were received in the respective Collectors' offices and notices of lien were filed in accordance with Section 3672 (a) of the 1939 Code after certain property of the delinquent taxpayer had been attached in connection with a suit against the taxpayer in a local state court, but before judgment was entered in the state court suit. The *Security Trust* case involved an attachment before judgment under California law, while the instant case involves an attachment before judgment under Ohio law.

The status of the local attachment lien in rela-

tion to provisions of federal law for the collection of taxes due the United States is a federal question, and whatever effect the doctrine of relation back may have under state law, it cannot operate to defeat the priority of the federal lien. In the *Security Trust* case, the attachment lien under California law was held to be contingent and inchoate—no more than a *lis pendens* notice that a right to perfect a lien existed—at the time the federal tax liens arose and therefore could not take precedence over the later federal tax liens which arose and had been recorded prior to the entry of judgment in the attachment suit. Examination of the Ohio statute and decisions demonstrates that the attachment lien here involved is equally contingent and inchoate, and dependent for its perfection upon the plaintiff's obtaining a favorable judgment in his suit. Uniformity in the administration of the federal taxing statute requires that the attachment in the instant case be accorded no greater dignity as a matter of federal law than that accorded the attachment lien involved in the *Security Trust* case.

The contingent or inchoate character of an attachment lien under Ohio law is particularly manifest in this case, which involves an attachment issued in connection with a suit brought against the delinquent taxpayer for pecuniary damages in an arbitrary amount for the alleged wrongful death by murder of the plaintiff's decedent. While a suit for wrongful death is permitted by the laws of

Ohio, any recovery is limited to the amount of pecuniary damages suffered by the persons in whose behalf the suit is brought, and the burden is upon the plaintiff to prove both the defendant's liability and the amount of damages recoverable. Neither the filing of the complaint nor the issuance and service of the writ of attachment in any way determines either the liability of the defendant or the amount of the recovery, and at the times the federal tax liens arose and were recorded, the amount of recovery, if any, in the wrongful death suit was speculative and conjectural.

In *United States v. New Britain*, *supra*, this Court held that the priority of the statutory liens there involved was to be determined on the principle that "the first in time is the first in right." The opinion makes it clear, however, that the determination of priority of a lien on that basis "must depend on the time it attached to the property in question *and became choate*." (Italics supplied.) In so holding, the Court explicitly noted that the decision was not contrary to the *Security Trust* case, which involved an *inchoate* lien arising out of an attachment before judgment.

Attachment liens are effective under state law for many purposes and serve as notice to others who may have dealings with the delinquent taxpayer, but they depend for their perfection entirely upon the obtaining of a favorable judgment in the related proceeding. To hold that the lien of the United States for its unpaid taxes is inferior

to such a contingent, inchoate lien would postpone the collection of taxes until the rights of an attaching plaintiff are finally determined and could be a serious handicap to the Government in the collection of its taxes. "If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled," as was said in the *Security Trust* case, the tax lien cannot be subordinated to such wholly contingent and undetermined claims against the taxpayer.

#### ARGUMENT

#### **A Lien of the United States for Its Unpaid Taxes Is Superior to a Prior Inchoate Lien Based on an Attachment Before Judgment Under State Law Which Is Dependent for Its Perfection Upon the Obtaining of a Judgment and the Issuance of Execution in the Related Civil Action**

Determination of the issue here presented is controlled by this Court's decision in the case of *United States v. Security Tr. & Sav. Bk.*, 340 U. S. 47 (the doctrine of which was recently reaffirmed in *United States v. New Britain*, 347 U. S. 81, 86). In this case, as in the *Security Trust* case, the United States, by reason of assessments of federal taxes, acquired a lien under Section 3670 of the Internal Revenue Code of 1939 (Appendix, *infra*, p. 29) upon "all property and rights to property, whether real or personal, belonging to" the delinquent taxpayer which, under Section 3671 of the 1939 Code (Appendix, *infra*, p. 29), attached to such property as of the date the Commissioner's

assessment list was received by the Collector of Internal Revenue. In each case, certain property of the taxpayer was attached prior to the date the federal tax lien arose, but judgment in the attachment proceeding was not entered until after the federal tax lien arose and had been recorded.<sup>2</sup>

In *United States v. Security Tr. & Sav. Bk.*, *supra*, one Morrison brought an action on an unsecured promissory note in the Superior Court of San Diego County, California, against one Styliano and his wife, and caused a writ of attachment to issue attaching the interest of the Stylianos in four parcels of real property. Thereafter, but before Morrison obtained judgment, the Commissioner of Internal Revenue assessed federal taxes against Styliano, and notices of lien therefor were duly filed in accordance with Section 3672 (a) of the

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<sup>2</sup> Section 3672 (a) of the 1939 Code (Appendix, *infra*, pp. 29-30) provides that the lien under Section 3670 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice of lien is filed as therein provided. Section 3672 (a) is inapplicable here because judgment was not entered in the attachment suit until after the federal tax lien arose and had been recorded, and the plaintiff in attachment was not, therefore, a "judgment creditor" within the meaning of the statute. *United States v. Security Tr. & Sav. Bk.*, 340 U.S. 47; *United States v. Gilbert Associates*, 345 U.S. 361. See, also, *In re Capitol Cleaners & Dyers*, 233 P. 2d 377 (Utah); *Republic Nat. Life Ins. Co., v. Hedstrom*, 346 Ill. App. 555, 105 N.E. 2d 782; *Samms v. Chicago Title & Tr. Co.*, 349 Ill. App. 412, 111 N.E. 2d 172; *United States v. Eisinger Mill & Lumber Co.*, 202 Md. 613, 98 A. 2d 81; *Mass Kenzie v. United States*, 109 F. 2d 540 (C.A. 9th); *United States v. Reese*, 131 F. 2d 466 (C.A. 7th); *Miller v. Bank of America, N. T. & S. A.*, 166 F. 2d 415 (C.A. 7th); *In re Capital Foundry Corp.*, 64 F. Supp. 885 (E.D. N.Y.).

1939 Code. Morrison later recovered judgment against the Stylianos and recorded an abstract thereof in the office of the Recorder of San Diego County. The issue which reached this Court arose in four suits subsequently brought in the Superior Court of San Diego County involving the above four parcels of real property upon which Morrison had procured an attachment, and to which proceedings Morrison and the United States were made parties. The first suit was to quiet title to one parcel which the Stylianos had sold to the plaintiffs who paid the balance of the purchase price into court. The other three suits were to foreclose separate mortgages on the other three parcels. (*Security Tr. & Sav. Bk., supra*, p. 48; *Winther v. Morrison*, 93 Cal. App. 2d 608, 610-611, 209 P. 2d 657.) The issue presented to this Court was whether the California District Court of Appeal (the California Supreme Court having refused to consider the case) erred in holding the prior attachment lien of Morrison superior to the federal tax liens there involved.

The facts of the instant case are essentially indistinguishable. On August 6, 1947, Oravitz, as administrator of the estate of John Oravec, deceased, filed a suit in the Court of Common Pleas of Mahoning County, Ohio, against Aeri for \$50,000 damages for the wrongful death of Oravec, and on the same date secured a writ of attachment against the personal property of Aeri held in a safe deposit box at the Dollar Savings & Trust Company.

Judgment was entered by the Court of Common Pleas in favor of the estate of Oravec in the amount of \$18,500 on January 19, 1949. In the meantime, however, the Commissioner of Internal Revenue had assessed federal income taxes against Aeri in the amount of \$79,551.80 (subsequently determined to be \$71,543.82)<sup>3</sup> which was included on an assessment list received by the Collector on November 18, 1947, and with respect to which notice of lien was duly filed on November 21, 1947. This proceeding to foreclose the Government's tax lien was filed on August 11, 1948 (R. 6), also before judgment was entered in the attachment suit in the Court of Common Pleas.<sup>4</sup>

In sustaining the superiority of the federal tax liens involved in the *Security Trust* case, this Court held (pp. 49-50), as it had in many prior decisions,<sup>5</sup> that the effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question, and further held that the doctrine of relation back—which would treat the attachment as merged in the judgment and thus relate the judgment lien back to the date of the attachment—could not operate to de-

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<sup>3</sup> See fn. 1, *supra*, p. 4.

<sup>4</sup> The District Court properly held (R. 13) that it had jurisdiction to determine the issues raised by the Government's foreclosure suit. *Markham v. Allen*, 326 U.S. 490; *Commonwealth Co. v. Bradford*, 297 U.S. 613; *Wilhoit v. Federal Deposit Ins. Corp.*, 143 F. 2d 14 (C.A. 6th).

<sup>5</sup> See *United States v. Waddill Co.*, 323 U.S. 353, 356-357, and cases cited; *Illinois v. Campbell*, 329 U.S. 362, 371.

feat the priority of the federal lien.<sup>6</sup> It was also held (p. 50) that the attachment lien there involved was "contingent or inchoate—merely a *lis pendens* notice that a right to perfect a lien exists" at the time the federal liens for unpaid taxes arose and as such did not take precedence over the federal liens.

In the instant case the District Court (the Court of Appeals affirming without opinion (R. 23)), while recognizing the principles laid down by this Court in the *Security Trust* case, nevertheless held that "Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Aeri's property as of the date of the commencement of the attachment proceeding," citing Ohio General Code, Section 11837, Appendix, *infra*, p. 34, and *Illinois v. Campbell*, 329 U. S. 362 (R. 13). It then attempted to distinguish the instant case from the *Security Trust* case on the ground that the latter "dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute" (R. 14).

We submit that the conclusion of the District Court is clearly in error. It not only violates the "cardinal principle of Congress" of uniformity in tax matters (*United States v. Gilbert Associates*, 345 U. S. 361) but rests upon a construction of California and Ohio law which stresses the form rather than the substance of the matter. In substance and

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<sup>6</sup> Compare *New York v. Maclay*, 288 U. S. 290, 293; *MacKenzie v. United States*, 109 F. 2d 540 (C.A. 9th); *Miller v. Bank of America, N. T. & S. A.*, 166 F. 2d 415 (C.A. 9th).

reality, the attachment proceeding under Ohio law differed in no material respect from that provided under California law. Since the "effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question" (*United States v. Security Tr. & Sav. Bk.*, *supra*, p. 49), this Court is free to determine the substance of the matter. To do so it is necessary to examine the Ohio law<sup>7</sup> and then to contrast it with the provisions of California law which were involved in *Security Trust*.

The attachment here involved was authorized by Section 11819 of the Ohio General Code (Appendix, *infra*, pp. 30-31), which provides that in a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant on any one of several grounds, including a suit based on the ground that the defendant has fraudulently or criminally contracted the debt, or incurred the obligation for which suit is about to be brought or has been brought. The rights and liabilities of a party to an attachment proceeding, and the provisions relating to the procuring and enforcing of attachments authorized by Section 11819, are set out in detail in succeeding sections of the Ohio General Code.<sup>8</sup> Section 11837 of the Ohio General

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<sup>7</sup> Applicable provisions of the Ohio General Code, Annotated (1938), are printed in the Appendix, *infra*, pp. 30-38.

<sup>8</sup> A suit for wrongful death is authorized by Section 10509-166 of the Ohio General Code, and the issuance of an attachment against property of the defendant in such an action ap-

Code, relied upon by the District Court (R. 13), provides in part that—

An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with a written notice hereinbefore mentioned. \* \* \*

The latter section of the Ohio General Code does not vest in the plaintiff in attachment any interest in the property of the defendant, nor does it segregate the attached property from his general estate so as to prevent the attaching of the Government's lien for taxes. Compare *Illinois v. Campbell, supra*. Instead, it merely specifies the date on which the attachment becomes effective, and makes the garnishee liable to the plaintiff in attachment for all property of the defendant in his hands and money and credits due from him to the defendant. This, also, is the substance of the California statute involved in *United States v. Security Tr. & Sav. Bk., supra*.<sup>9</sup> This and other pertinent pro-

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pears to be proper. See Secs. 11819 and 11845 of the Ohio General Code; *Montanari v. Haworth*, 108 Ohio St. 8, 14-16, 40 N. E. 319.

<sup>9</sup> Deering's California Code of Civil Procedure (1941 ed.):

Sec. 537 [When and actions in which attachment may issue]. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of

visions of the Ohio General Code make it clear that when the writ of attachment or garnishment is properly executed it merely places the attached property in a form of *custodia legis* pending final judgment in the attachment proceeding. The Ohio statute provides generally how the sheriff shall execute the order of attachment,<sup>10</sup> and "When it is personal property, and can be come at, he shall take it into his custody, and hold it subject to the order of the court." Section 11826 of the Ohio General Code (Appendix, *infra*, p. 32). Section 11827 of the Ohio General Code (Appendix, *infra*, pp. 32-33) authorizes the sheriff to deliver the property levied upon to the person in whose possession it is found upon execution by the latter of satisfactory bond

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any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

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Sec. 542a. [Pocket Supplement (1947)] [Lien on realty: When effective: Duration and extension.] The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated; \* \* \*

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the recording with the recorder of an abstract of the judgment in the action. \* \* \*

<sup>10</sup> A return of the officer whose duty it is to execute the writ which fails to show compliance with its terms is insufficient to give the court jurisdiction over the property. See *Green v. Coit*, 81 Ohio St. 280, 90 N. E. 794.

to the plaintiff in double the amount of the appraised value of the property, and Section 11828 (Appendix, *infra*, p. 33) provides that if in the case of a garnishment the officer cannot get possession of the property, he must leave with the garnishee a copy of the order of attachment, with a written notice that he appear in court and answer—which was done here, except that it does not appear whether an answer was filed by the bank in the attachment suit as provided by Section 11847 of the Ohio General Code (Appendix, *infra*, p. 35).

So far as material here, Section 11848 of the Ohio General Code (Appendix, *infra*, pp. 35-36) authorizes the garnishee to deliver to the officer serving the writ, or to the court, the property of the defendant in his possession and be discharged from further liability to the defendant to that extent. Under Section 11850 (Appendix, *infra*, p. 36), *if* the garnishee appears and answers as directed, *and* it is discovered that at or after service of the order of attachment he was possessed of property of the defendant, or was indebted to him, or either,

the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs.

The property of Michael Aeri here involved which was the subject of the attachment was not delivered

by the Trust Company to the sheriff or the court; it does not appear that the Trust Company gave bond as contemplated by Section 11850 of the Ohio General Code; and no proceeding as provided by Section 11851 of the Ohio General Code in case of such failure appears to have been taken. Apparently the parties were content to allow the contents of Acri's safe deposit box to remain in the custody of the Trust Company, which it has held as guardian of Acri's estate since its appointment as such on June 14, 1948.

Section 11853 of the Ohio General Code (Appendix, *infra*, pp. 36-37) provides that:

Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right.

Section 11854 of the Ohio General Code (Appendix, *infra*, p. 37) provides that if judgment in the action on which the attachment is based be rendered for the defendant, the attachment shall be dissolved and the property attached, or its proceeds returned to him, and Section 11855 (Appen-

dix, *infra*, pp. 37-38) provides that if judgment shall be rendered for the plaintiff, it shall be satisfied as follows:

So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and execution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant.

It is clear from the foregoing provisions that an attachment under Ohio law does not give to plaintiff a choate lien—that it is a mere *lis pendens* notice that a right to perfect a lien exists. See *United States v. City of New Britain*, *supra*, pp. 84, 86.

To support its conclusion that the California statute dealt with in the *Security Trust* case, *supra*, gives no such effectiveness to attachment proceedings and liens as does the Ohio statute here involved, the District Court said (R. 16) that the Ohio courts have characterized the attachment lien under Ohio law as an “execution in advance”, citing

*Rempe & Son v. Ravens*, 68 Ohio St. 113, and *Green v. Coit*, 81 Ohio St. 280, and accord it equal standing with an execution lien, citing *Shorten v. Drake*, 38 Ohio St. 76. But the state court's characterization, whatever the effect of the lien under state law, is not controlling here. Compare *United States v. Waddill Co.*, 323 U.S. 353, 356-357, involving a landlord's lien under Virginia law which the Virginia Supreme Court of Appeals had characterized as fixed and specific and not merely inchoate.

Substantially the same characterization of an attachment under California law was relied upon by the California District Court of Appeal in *Winther v. Morrison*, 93 Cal. App. 2d 608, 209 P. 2d 657, reversed by this Court in *United States v. Security Tr. & Sav. Bk.*, *supra*. In that case the California District Court of Appeal, citing *Porter v. Pico*, 55 Cal. 165, 174, quoted from 3 Cal. Jur. 402, to the effect that "It [an attachment under California law] is, in effect, an incipient execution—an execution, so to speak, in advance of trial and judgment." (*Id.*, pp. 611-612.) Thus, it was upon the same basis there as here that the lower courts held that the attachment lien was superior to the subsequent tax liens of the United States. But in *United States v. Security Tr. & Sav. Bk.*, *supra*, this Court rejected the premise of the state court's decision and concluded that under the law there involved (p. 50):

The attachment lien gives the attachment creditor no right to proceed against the property unless he gets a judgment within three

years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded. Thus the attachment lien is contingent or inchoate—a mere *lis pendens* notice that a right to perfect a lien exists.

Thus it is clear that the realities of the situation govern. And, when so considered, it is manifest that the attachment here involved, like the attachment involved in the *Security Trust* case, gave the plaintiff in attachment no right to proceed against the property unless and until he obtained a judgment in the main proceeding. As is true of an attachment under California law, numerous contingencies might arise that would prevent the attachment lien under Ohio law from ever becoming perfected by a judgment awarded and recorded. If anything, the attachment lien here involved was even more contingent when the federal tax lien arose and was recorded than was the attachment lien involved in the *Security Trust* case, which was premised on a promissory note in a definite amount. Here the attachment was based upon a suit for pecuniary damages in an arbitrary amount of \$50,000 (and the order of attachment was in the same amount) for the alleged wrongful death of Oravec. The legal liability of Aeri, if any, remained to be established by the evidence, and under Section 10509-166 of the Ohio General Code the jury could give judgment only for “such damages as it may

think proportioned to the *pecuniary* injury resulting from such death, to the persons, respectively, for whose benefit the action was brought." (Italics supplied.) See *Kennedy v. Byers*, 107 Ohio St. 90, 140 N. E. 630. The amount due the plaintiff in attachment was in no way determined at the time the attachment issued or at the time the federal tax lien arose. Issuance of the attachment went no further in establishing either the validity or the amount of the plaintiff's claim than did the filing of his complaint on which it was based. It was merely a notice of a claim, the amount of which, if any, could not be foretold with any degree of certainty before judgment. This is far different from an assessment for local taxes, such as was involved in *United States v. New Britain*, *supra*, the amount of which is *prima facie* correct.

In this respect, the decision in *Illinois v. Campbell*, 329 U. S. 362, relied upon by the District Court (R. 13), not only does not support, but is directly contrary to, its decision. The decision in that case makes it clear that as a minimum requirement (p. 375),

the lien must be definite, and not merely ascertainable in the future by taking further steps, in at least three respects as of the crucial time. These are: (1) the identity of the lienor, *United States v. Knott*, 298 U.S. 544, 549-551; (2) the amount of the lien, *United States v. Waddill Co.*, 323 U.S. at 357-358; and (3) the property to which it attaches, *United States v. Waddill*

*Co., supra; United States v. Texas* [314 U.S. 480], *supra; New York v. Maclay, supra. It is not enough that the lienor has power to bring these elements, or any of them, down from broad generality to the earth of specific identity.* [Italics supplied]

While lack of definiteness as to the property subject to the state lien was an important consideration in *Illinois v. Campbell, supra*, so was it also in *United States v. Waddill Co.*, 323 U.S. 353, and *United States v. Texas*, 314 U.S. 480. However, in all three cases this Court also emphasized that the definiteness as to amount likewise is an essential factor in determining whether local statutory liens are specific and perfected liens. In *United States v. Texas, supra*, while this Court pointed out (p. 487) that the "property devoted to or used in his business as a distributor," to which the state lien for taxes attached, "is neither specific nor constant," it added: "But a more important consideration is that the *amount* of the claim secured by the lien is unliquidated and uncertain." (Italics supplied.) And in *United States v. Waddill Co., supra*, in holding that the amount claimed for rent was uncertain, this Court said (pp. 357-358): "The landlord may have been mistaken as to the rental rate or as to payments previously made and the tenant may have been entitled to a set-off."

In view of the demonstrated inchoate character of the attachment lien here involved, the only basis on which the decisions below can be sustained is

by application of the doctrine of relation back—which this Court rejected in the *Security Trust* case as contrary to the realities of the case.<sup>11</sup> The State of Ohio has, for purposes of state law, made an attachment binding on the property from the

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<sup>11</sup> Two secondary reasons given by the District Court as a basis for its decision are without merit. First, even if "The property subject to the present liens is constructively in the custody of the state court by reason of the attachment," as stated by the District Court (R. 13), such constructive custody could not prevent the federal lien from attaching. Compare *Illinois v. Campbell*, *supra*, p. 376. And it could not make the present attachment lien any more choate than the attachment lien in *United States v. Security Tr. & Sav. Bk.*, *supra*. Secondly, although the Trust Company, as guardian of Aeri, had denied any tax liability in its answer, as stated by the District Court (R. 12, 15), this denial is of no effect in view of the stipulation of facts subsequently filed with the court, wherein it was stipulated on behalf of Dollar Savings & Trust Company, as guardian of Aeri, "that there is no issue as to the amount of the taxes assessed against the defendant Michael P. Aeri" (R. 9), and it was further stipulated by the parties that the only issue in the case is the relative priority of the federal tax lien and the attachment lien (R. 10-11). The Trust Company is the duly appointed guardian of the estate of Aeri and under Ohio law (Sections 10507-1 *et seq.*, and particularly Section 10507-15) it was the duty of the Trust Company, as such guardian, to defend this action on behalf of Aeri. See *Campbell v. Park*, 32 Ohio St. 544, 560-562. While the stipulation states that the Trust Company is "acting only as a disinterested stake holder with reference to the moneys and assets now remaining in their possession in the safety deposit box or by virtue of receipts turned over to them in the form of rentals" (R. 9), this was true only prior to the trust company's appointment as guardian. It was made a defendant in its capacity as such guardian, and was acting within its authority in making the above stipulations. Accordingly, it was error for the District Court to conclude, in the face of these stipulations, that "an intent to admit the tax liability legally can not be attributed to it in the face of its denial in its answer." (R. 13.)

time of service. Section 11837 of the Ohio General Code. This statutory preference is not binding on the Federal Government.<sup>12</sup> As this Court pointed out in *United States v. New Britain*, *supra*, p. 86, "Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbi-

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<sup>12</sup> Since the celebrated opinion of Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat. 316, where it was held (p. 435) that "the States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government", this Court has uniformly held that the laws of a state cannot bind the United States in its rights. E.g., the priority granted the United States in the payment of its debts cannot be defeated by state insolvency laws (*Field v. United States*, 9 Pet. 182, 201); the tax liens of the United States are not subject to state recording laws (*United States v. Snyder*, 149 U.S. 210); a partnership under state law may nevertheless be an association taxable as a corporation for federal income tax purposes (*Burk-Waggoner Assn. v. Hopkins*, 269 U.S. 110); a state law cannot affect the right of the United States to levy and collect a federal estate tax (*Florida v. Mellon*, 273 U.S. 12); the United States is not bound by provisions of state law limiting the filing of claims against the estate of a decedent (*United States v. Summerlin*, 310 U.S. 414); the United States is not bound by a state statute of limitations (*United States v. Thompson*, 98 U.S. 486; *United States v. Nashville, &c., R'y Co.*, 118 U.S. 120; *Stanley v. Schwalby*, 147 U.S. 508; *Guaranty Trust Co. v. United States*, 304 U.S. 126). See, also, *Morgan v. Commissioner*, 309 U.S. 78, 80-81, and fn. 5; *Burnet v. Harmel*, 287 U.S. 103, 110.

trary time even before the amount of the tax, assessment, etc., is determined." See, also, *United States v. Snyder*, 149 U.S. 210, 214. Compare *Illinois v. Campbell*, *supra*, p. 375.

In the *New Britain* case, the Supreme Court of Errors of Connecticut had stated that the liens of the city were specific and perfected. While pointing out that such characterization of a lien by the state court is not conclusive against the Federal Government, this Court accepted the state court's characterization as to specificity since the city's liens attached to specific parcels of real property, and added (p. 84) that its liens "may also be perfected in the sense that there is nothing more to be done to have a choate lien—when the identity of the lienor, the property subject to the lien, and the amount of the lien are established". It then held (pp. 85-86) that the priority accorded the United States by R. S. Sec. 3466 is absolute, but that Section 3670 of the 1939 Code does not in terms confer priority upon federal tax liens, and in the absence of a showing of insolvency the priority of the statutory liens there involved was to be determined by the principle of law that "the first in time is the first in right", and that "Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question *and became choate*." (Italics supplied.)

That the principle of first in time, first in right, does not apply, however, where, as here, the prior adverse lien is only a contingent or inchoate lien—a mere *lis pendens* notice that a right to perfect a

lien exists—is made clear by the statement in the *New Britain* case that the decision there is not inconsistent with *United States v. Security Tr. & Sav. Bk.* for the reason that (p. 86):<sup>13</sup>

The *Security Trust* case involved an inchoate attachment lien that had not ripened into a judgment at the time the federal tax liens attached. We noted that “[n]umerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded.” 340 U.S., at 50. Thus, the attachment lien was “merely a *lis pendens* notice that a right to perfect a lien exists.” *Ibid.* Such inchoate liens may become certain as to amount, identity of the lienor, or the property subject thereto only at some time subsequent to the date the federal liens attach and cannot then be permitted to displace such federal liens. Otherwise, a State could affect the standing of federal liens, contrary to the established doctrine, simply by causing an inchoate lien to attach at some arbitrary time even before the amount of the tax, assessment, etc., is determined. Accordingly, we concluded in *Security Trust* “that the tax liens of the

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<sup>13</sup> The new Internal Revenue Code of 1954 makes no substantive changes in the federal tax lien provisions here involved. See Secs. 6321, 6322 and 6323 of the 1954 Code (P.L. 591, 83d Cong., 2d Sess.); H. Rep. No. 1337, 83d Cong., 2d Sess., pp. A406-A407; S. Rep. No. 1622, 83d Cong., 2d Sess., pp. 575-576.

United States are superior to the inchoate attachment lien \* \* \*". *Id.*, at 51.

In sum, there is no substantive difference between an attachment lien under the statutes of Ohio here involved and under the attachment statutes involved in *United States v. Security Tr. & Sav. Bk.*, *supra*. Contrary to the conclusion of the District Court (R. 14), an attachment before judgment is no more effective under Ohio law than under California law. Formal or procedural differences between the statutes do not provide a valid basis for distinction if there is to be uniformity in the administration of the federal taxing statutes. An attachment before judgment does not determine the rights of the plaintiff in attachment. The so-called lien thereby created is effective under state law for many purposes. It serves as notice to others who may have dealings with the defendant. But it depends for its perfection entirely upon obtaining a favorable judgment in the related proceeding. Pending the entry of such judgment it is merely a *lis pendens* notice of a right to perfect a lien. To hold that the lien of the United States for taxes is subordinate to such a contingent lien would postpone the collection of taxes until the rights of an attaching plaintiff are finally determined. "If the purpose of the federal tax lien statute to insure prompt and certain collection of taxes due the United States from tax delinquents is to be fulfilled, "as this Court said in the *Security Trust* case, *supra* (p. 51), the lien cannot be subor-

dinated to wholly contingent and undetermined claims against the delinquent taxpayer.

CONCLUSION

The decision of the court below is erroneous. The judgment below should be reversed.

Respectfully submitted,

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SEPTEMBER, 1954.

## Internal Revenue Code of 1939:

## SEC. 3670. PROPERTY SUBJECT TO LIEN.

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person.

(26 U. S. C. 1952 ed., Sec. 3670.)

## SEC. 3671. PERIOD OF LIEN.

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time.

(26 U. S. C. 1952 ed., Sec. 3671.)

SEC. 3672 [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any

mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia.

\* \* \* \* \*

(26 U. S. C. 1952 ed., Sec. 3672.)

Page's Ohio General Code, Annotated (1938):

SEC. 11819. *Grounds of attachment.*—In a civil action for the recovery of money, at or

after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

\* \* \* \* \*

(6) Is about to remove his property, in whole or part, out of the jurisdiction of the court, with the intent to defraud his creditors;

\* \* \* \* \*

(8) Has property or rights in action, which he conceals;

\* \* \* \* \*

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; \* \* \*

\* \* \* \* \*

SEC. 11820. *Affidavit for order of attachment; contents.*—An order of attachment shall be made by the clerk of the court in which the action is brought, in any case mentioned in the next preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing;

- (1) The nature of the plaintiff's claim;
- (2) That it is just;

(3) The amount which the affiant believes the plaintiff ought to recover, and

(4) The existence of any one of the grounds for an attachment enumerated in such section.

\* \* \* \* \*

SEC. 11826. *How order executed.*—The sheriff shall execute the order of attachment without delay. He shall go to the place where the defendant's property is, and there, in the presence of two freeholders of the county, declare that, by virtue of the order, he attaches the property at the suit of the plaintiff. Then with the freeholders, who must be first sworn by him, he shall make a true inventory and appraisement of all the property attached, which shall be signed by the officer and freeholders, and returned with the order. When the property attached is real property, the officer shall leave with the occupant thereof, or, if there is no occupant, in a conspicuous place thereon, a copy of the order. When it is personal property, and can be come at, he shall take it into his custody, and hold it subject to the order of the court. (R. S. Sec. 5528.)

SEC. 11827. *When property may be delivered to persons with whom found.*—The sheriff shall deliver the property attached to the person in whose possession it was found, upon his executing, in the presence of the sheriff, a bond to the plaintiff, with sufficient

surety, resident in the county, to the effect that the parties to it are bound, in double the appraised value of the property, that it or its appraised value in money will be forthcoming to answer the judgment of the court in the action. If it appears to the court that any part of such property has been lost or destroyed by unavoidable accident, the value thereof must be remitted to the person so bound. (R. S. Sec. 5529.)

SEC. 11828. *Service of garnishee.*—When the plaintiff, his agent or attorney, makes oath in writing that he has good reason to believe, and does believe, that any person, partnership, or corporation in the affidavit named, has property of the defendant in his possession, describing it, if the officer cannot get possession of such property, he must leave with such garnishee a copy of the order of attachment, with a written notice that he appear in court and answer, as hereinafter provided. When the garnishee does not reside in the county in which the order of attachment was issued, the process may be served by the proper officer of the county in which he resides, or be personally served. (R. S. Sec. 5530.)

SEC. 11836. *Form of return.*—The officer shall return upon every order of attachment what he has done under it. The return must show the property attached and the time it was attached. When garnishees are served, their

names, and the time each was served, must be stated. The officer shall return with the order all bonds given under it. (R. S. Sec. 5537.)

SEC. 11837. *When property and garnishee bound.*—An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice hereinbefore mentioned. But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (R. S. Sec. 5538.)

S. C. 11843. *How attached property disposed of.*—The court, or a judge thereof in vacation, may make proper orders for the preservation of property during the pendency of a suit, and direct a sale of it when, because of its perishable nature, or the cost of its keeping, that will be for the benefit of the parties. The sale must be public, after such advertisement as is prescribed for the sale of like property on execution, and be made in such manner, and terms of credit, with security, as, having regard to the probable duration of the action, the court or judge directs. The sheriff shall hold and pay over all proceeds of the sale collected by him, and all money received by him from garnishees, under the same requirements and responsibilities of himself and sureties as

are provided in respect to money deposited in lieu of bail. (R. S. Sec. 5544.)

SEC. 11847. *Appearance and answer of garnishee.*—After the written notice is issued as hereinbefore provided, the garnishee shall appear and answer within the time allowed the defendant or defendants to answer the petition upon which the attachment was granted. Under oath, he shall answer all questions put to him touching property of every discription, and credits of the defendant in his possession or under his control and truly disclose the amount owing by him to the defendant, whether due or not in the case of a corporation, any stock held therein by or for the benefit of the defendant, at or after the service of notice. (R. S. Sec. 5547.)

SEC. 11848. *Garnishee may pay money into court or to sheriff.*—A garnishee may pay the money owing by him to the defendant, or so much thereof as the court orders, to the officer having the attachment or into court. He shall be discharged from liability to the defendant for money so paid, not exceeding the plaintiff's claim and shall not be subjected to costs beyond those caused by his resistance of the claims against him. If he discloses the property in his hands, or the true amount owing by him and delivers or pays it according to the order of the court, he shall be allowed his costs. When any part of the earnings of the debtor is not exempt, the garnishee process shall remain in

force from the time of its service until the trial of the cause to determine the claim, debt or demand of the creditor and bind all such earnings due at the time of service, and which will become due from that time until the trial of such cause. But the garnishee may pay to the debtor an amount equal to ninety per cent of such personal earnings, due when the process is served or becoming due thereafter until trial, and be released from any liability to such creditor therefor. (R. S. Sec. 5548.)

SEC. 11850. *Disposition of property in hands of garnishee.*—If the garnishee appears and answers and on his examination it be discovered that at or after, the service of the order of attachment and notice upon him, he was possessed of property of the defendant, and was indebted to him, or either, the court may order the delivery of such property, and the payment of the amount owing by him, into court or either; or it may permit the garnishee to retain the property, or the amount owing, upon his executing a bond to the plaintiff, by sufficient surety, to the effect that the amount will be paid, or the property forthcoming, as the court directs. (R. S. Sec. 5550.)

SEC. 11853. *Judgment against garnishee.*—Final judgment shall not be rendered against the garnishee until the action against the defendant in attachment is determined. If judgment be rendered therein for the defendant

in attachment, the garnishee shall be discharged, and recover costs. If the plaintiff recovers, and the garnishee delivers up the property and credits of the defendant in his possession, and pays the money due from him, as the court orders, he must be discharged, and the costs of proceedings against him be paid out of the property and money so surrendered, or as the court deems right. (R. S. Sec. 5553.)

SEC. 11854. *Judgment for defendant.*—If the judgment in the action be rendered for the defendant, the attachment shall be discharged, and the property attached, or its proceeds returned to him. (R. S. Sec. 5554.)

SEC. 11855. *Proceedings after judgment for plaintiff.*—If judgment be rendered for the plaintiff, it shall be satisfied as follows: So much of the property in the hands of the officer, after applying the money arising from the sale of perishable property and so much of the personal property, and lands and tenements, if any, whether held by legal or equitable title, as is necessary, shall be sold by order of the court, under the same restrictions and regulations as if it had been levied on by execution. The money arising therefrom, with the amount which may be recovered from the garnishee, shall be applied to satisfy the judgment and costs. If there be not enough to satisfy them, the judgment shall stand and exe-

cution may issue thereon for the residue, as in other cases. Any surplus of the attached property, or its proceeds, shall be returned to the defendant. (R. S. Sec. 5555.)

APR 13 1954

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**In the Supreme Court of the United States**

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WILLEY, Clerk

**OCTOBER TERM, 1953****No. ~~601~~ 33****UNITED STATES OF AMERICA,*****Petitioner,*****v.**

**MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE  
DOLLAR SAVINGS & TRUST CO. OF YOUNGSTOWN, OHIO,  
GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and  
EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF  
JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.**

**ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.**

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**BRIEF OF RESPONDENT, EDWARD ORAVITZ,  
ADMINISTRATOR OF THE ESTATE OF JOHN  
ORAVITZ, DECEASED, OPPOSING CERTIORARI.**

---

**JOHN A. WILLO,**  
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*Counsel for Respondent.*

## TABLE OF CONTENTS.

Statement of Facts .....	2
Argument .....	3
Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and re- corded subsequently to the date of the attach- ment lien .....	3
Nature of Attachment Lien Under Ohio Statutes .....	3
Inapplicability of California Law .....	5
Priority of Attachment Lien .....	7
Priority of "Debt Due United States" .....	8
Operative Effect of Attachment Lien .....	9
Conclusion .....	12

## TABLE OF AUTHORITIES.

### Federal Courts.

<i>Carswell Construction Co., Re</i> , 13 Fed. (2) 667 .....	7
<i>Mackenzie v. United States</i> (C. C. A. 9th, 1940), 109 F. (2d) 540 .....	7
<i>New Britain</i> case, Adv. Rep. U. S. L. Ed. Vol. 98, p. 289 .....	9, 13, 14
<i>New Orleans v. Harrell</i> , 134 Fed. (2) 399 .....	7
<i>Rowe Bros., Re</i> , 18 Fed. (2) 658 .....	8
<i>Spokane County v. United States</i> , 279 U. S. 80, 73 L. Ed. 621 .....	7
<i>U. S. v. Acres</i> (Mo. 1947), 73 Fed. Sup. 820 .....	7
<i>U. S. v. Canal Bank</i> (C. C. Me.), 3 Story 79, Fed. Cas. No. 14,715 .....	7

<i>U. S. v. Collins</i> (C. C. N. Y.), Fed. Cas. No. 14,834	7
<i>U. S. v. Fisher</i> , 2 Cranch. 358, 2 L. Ed. 304	8
<i>U. S. v. Gilbert Associates</i> , 345 U. S. 361	13
<i>U. S. v. Martin Fireproofing Corp.</i> (C. C. Ohio 1948), 168 Fed. (2) 808	7
<i>U. S. v. Mechanics Bank</i> (D. C. Pa.), Fed. Cas. No. 15,756	7
<i>U. S. v. Security Trust</i> (1950), 340 U. S. 47, 95 L. Ed. 53	4, 6, 12, 13
<i>U. S. v. Texas</i> , 314 U. S. 480, 86 L. Ed. 356	7
<i>U. S. v. Waddill</i> , 323 U. S. 353, 89 L. Ed. 294	7
<i>Winston-Salem v. Powell Paving Co.</i> (1937), 7 Fed. Supp. 424	8

#### Ohio Courts.

<i>Benedict v. Peters</i> , 58 O. S. 527	5
<i>Liebman v. Ashbaker</i> , 36 O. S. 94	5
<i>Malkey v. Ruggles</i> (1923), 24 O.N.P. (N.S.) 433	9
<i>McCombs v. Howard</i> , 18 O. S. 422	5
<i>Ohio Auxiliary Fire Alarm Co. v. Heisley</i> (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691	9
<i>Oil Well Supply Co. v. Koen</i> , 64 O. S. 568	4
<i>Pilgrim Distributing Corp. v. Galsworthy</i> , 148 O. S. 567	4
<i>Rempe v. Ravens</i> , 68 O. S. 113	4
<i>Shorten v. Drake</i> (1882), 38 Ohio St. 76	9
<i>St. John v. Parson</i> , 54 O. App. 420	4
<i>Wright, et al. v. Franklin Bank, et al.</i> , 59 Ohio St. 80	10

### Other State Courts.

<i>Bishop v. Black</i> (1951), 64 S. E. (2) 167 .....	8
<i>Hopkins v. Duffy</i> (Pa.), 9 Lanc. Bar 125 .....	7
<i>Louisiana State University v. Hart</i> (Louisiana Supreme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366 .....	7, 10, 11
<i>Tildestly Coal Co. v. American Fuel Corp.</i> (1947), 130 W. Va. 720, 45 S. E. (2) 750 .....	8
<i>United States v. Yates</i> (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399 .....	7, 11

### Texts and Opinions.

5 <i>Am. Jur.</i> p. 87, sec. 815 .....	3
5 <i>Am. Jur.</i> sec. 825, p. 93 .....	9
6 <i>Am. Jur.</i> p. 873, sec. 548 .....	8
<i>Annotation</i> , 83 L. Ed. 1239 .....	8
7 <i>Corpus Juris Secundum</i> , Sections 254, 255, p. 430 et seq. ....	9
4 <i>O. Jur.</i> p. 201, sec. 158 .....	4
4 <i>O. Jur.</i> p. 202, sec. 159 .....	5
4 <i>O. Jur.</i> p. 248, secs. 190 to 192 .....	5
4 <i>O. Jur.</i> p. 250, sec. 192 .....	5
1 <i>Op. A. G.</i> 616 (1823) .....	7

### Statutes and Rules.

<i>Deering's California Code of Civil Procedure</i> (1949):	
Sec. 537 .....	5
Sec. 542a .....	5
Sec. 542b .....	5

**Internal Revenue Code:**

Sec. 3670 (26 U. S. C., 1946 ed., Sec. 3670) -----	8
Sec. 3671 (26 U. S. C., 1946 ed., Sec. 3671) -----	8
Sec. 3672 (26 U. S. C., 1946 ed., Sec. 3672) -----	7, 8

**Ohio General Code:**

Sec. 11837 -----	3, 4, 5, 9
Sec. 11858 -----	5
Sec. 11859 -----	5

**Revised Statutes:**

Sec. 3466 (31 U. S. C., 1946 ed., Sec. 191) -----	7, 8
---	------

Rules of Civil Procedure, Conformity Rule 64 (28 U. S. C. A.) -----	12
Rule 38 of the United States Supreme Court -----	14

# In the Supreme Court of the United States

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OCTOBER TERM, 1953.

No. 641

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UNITED STATES OF AMERICA,  
*Petitioner,*

v.

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE  
DOLLAR SAVINGS & TRUST CO. OF YOUNGSTOWN, OHIO,  
GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and  
EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF  
JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.

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ON PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT.

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**BRIEF OF RESPONDENT, EDWARD ORAVITZ,  
ADMINISTRATOR OF THE ESTATE OF JOHN  
ORAVITZ, DECEASED, OPPOSING CERTIORARI.**

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The Circuit Court of Appeals for the Sixth Circuit affirmed a judgment of the U. S. District Court for the Northern District of Ohio, Eastern Division, declaring an attachment lien, duly perfected in a State court action for wrongful death and resulting in judgment therein, to be superior to a lien for income taxes filed subsequent to the attachment, the District Court following the Ohio law that such attachment is an "execution in advance" under the Ohio statutes and superior to liens subsequently filed.

## STATEMENT OF FACTS.

On February 17, 1947, Michael P. Acri shot and killed John Oravec while the latter was partaking of refreshments at the Acri Tavern. Found guilty of murder, he was sentenced to a life term at the Ohio State Penitentiary. Surviving are Oravec's parents, of whom he was the sole support.

Acri and his wife were possessed of considerable property; but the most liquid assets were cash savings and Government bonds contained in a safe-deposit box at the vault of the Dollar Savings and Trust Company in the name of Acri, discovered by Mr. John Willo, Counsel for the administrator of the Oravec estate.

On August 6th, 1947, suit for wrongful death was filed in the Court of Common Pleas of Mahoning County, and on the same day an attachment of the funds and securities at the Dollar Savings and Trust Co. was issued and service had on garnishee.

On January 19, 1949, on trial before Judge Doyle, judgment in the sum of \$18,500 was rendered in favor of the administrator suing on behalf of Oravec's parents. The journal entry reads in part:

"The Court further finds that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Co. of Youngstown, Ohio: that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947, and for the full payment and satisfaction of the judgment entered herein."

Subsequent to the attachment for wrongful death on August 6th, 1947, the Commissioner for Internal Revenue

had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector of Internal Revenue, and Demand for Payment was mailed to Acri on **November 11, 1947.**

On **November 21, 1947**, a tax lien was filed in the office of Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served upon The Dollar Savings & Trust Company.

On **June 14, 1948**, The Dollar Savings & Trust Company was appointed guardian of the estate of Michael P. Acri, who had been incarcerated upon his conviction for the murder of Oravec.

### **ARGUMENT.**

**Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and recorded subsequently to the date of the attachment lien.**

### **NATURE OF ATTACHMENT LIEN UNDER OHIO STATUTES.**

The nature of an attachment has been stated to be a "direct appropriation by authority of law of specific property of the debtor, for the purpose of satisfying the demand, and the *lien thereby created is substantial and enduring, as much as a mortgage or pledge.*" 5 Am. Jur. p. 87, Sec. 815.

The Ohio General Code, section 11837, provides:

"An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice."

The absoluteness of an attachment lien under the Ohio statute, as distinguished from being a mere inchoate right to lien or *lis pendens*, is stated by the Ohio Supreme Court in *Rempe v. Ravens*, 68 O. S. 113 at 128:

"The writ of attachment or garnishment is in the nature of an 'execution in advance' and the office and purpose of such writ is to hold and bind the property seized until final judgment in the attachment proceeding, and if upon final hearing in the attachment suit judgment is rendered in favor of the plaintiff, the effect of such judgment is to give plaintiff the right to enforce any lien he shall have acquired by his attachment or garnishment against whatever interest the defendant may have in the property attached or garnished."

The opinion of Justice Minton in *United States v. Security Trust* (1950), 340 U. S. 47, 95 L. Ed. 53, founded on the California statute and the decisions construing it, does not harmonize with the laws of Ohio. There is no decision in Ohio which holds an attachment lien to be only a contingent or inchoate right, a mere *lis pendens*, which gives it no priority over a subsequent lien. An attachment in Ohio is considered a proceeding in rem, the lien whereof prevails over subsequent liens unless released or the main action dismissed. *Pilgrim Distributing Corp. v. Galsworthy*, 148 O. S. 567; *St. John v. Parson*, 54 O. App. 420; *Oil Well Supply Co. v. Koen*, 64 O. S. 568. "The attaching creditor acquires from the levy a right to have the property held by the attaching officer, and under subsequent order, a right to have the property sold." 4 O. Jur. p. 201, sec. 158.

When an order of attachment is issued and executed by seizure, the levy gives rise to a lien. The General Code of Ohio, Sec. 11837, specifically provides that "an order of attachment shall bind the property attached from the time

of service." *Liebman v. Ashbaker*, 36 O. S. 94; *McCombs v. Howard*, 18 O. S. 422. "The lien of the attachment does not depend upon the sufficiency of the affidavit, but upon the taking of the property under the writ." *Benedict v. Peters*, 58 O. S. 527 at 536; 4 O. Jur. p. 202, sec. 159.

The procedure of determining priorities in attachment cases is provided by Sec. 11858, G. C. of Ohio. A trial of the claimant's right to the property can be had only at the instance of such claimant. 4 O. Jur. p. 250, sec. 192. Section 11859 G. C. of Ohio further provides:

"When several attachments are executed on the same property, or the same person is made garnishee by several parties, on motion of any of the plaintiffs the court may order a reference to ascertain and report the amounts and priorities of the several attachments."

See also 4 O. Jur. p. 248, secs. 190 to 192.

#### INAPPLICABILITY OF CALIFORNIA LAW.

The California attachment statute differs materially from the one in Ohio and the decisions interpreting the former have no application to the latter. The California Code of Civil Procedure, section 537, subjects the property attached "as security for the satisfaction of any judgment that may be recovered," whereas the Ohio statute, G. C. 11837, provides that "an order of attachment shall bind the property attached from the time of service." No lien is expressly provided by the California statute when the property attached is personal property, although a lien is provided by section 542a when the attachment is on real property, upon the recording of a copy of the writ together with a description of the property attached. As to attachments on personal property, section 542b provides:

"An attachment or garnishment of personal property  
\* \* \* shall cease to be of any force and effect and the

property levied on be released from the attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made."

Construing the California statute in an attachment on real property, in the case of *United States v. Securities Trust and Savings Bank, etc.*, 340 U. S. 47, 95 L. Ed. 53, Mr. Justice Minton stated:

"The attachment lien gives the attachment creditor no right to proceed against the property unless he gets judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded \* \* \*. He had a mere caveat of a more perfect lien to come."

Inasmuch as the Government depends upon the decision of the above cited California case, we believe it will aid the Court for us, at this time, to quote further from Mr. Justice Minton's decision:

"The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' *Illinois vs. Campbell*, 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puissecur vs. Yarbrough*, 29 Calif. 2d 409, 412, by stating that 'the attaching creditor obtains only a potential right or a contingent lien.' Examination of the California statute shows that the above is an apt description. \* \* \*"

### PRIORITY OF ATTACHMENT LIEN.

The holder of a mechanic's lien, though ordinarily not a "mortgagee, pledgee, purchaser or judgment creditor" within the meaning of Sec. 3672 (2) U. S. C., was held in the Taylorcraft case, *U. S. v. Martin Fireproofing Corp.* (C. C. Ohio 1948), 168 Fed. (2) 808, to have priority over a subsequent income tax lien. See also *Re Carswell Construction Co.*, 13 Fed. (2) 667. Other decisions are of similar effect and give an attachment lien, perfected prior to the filing of an income tax lien, priority over the latter; *Louisiana State University v. Hart* (1946), 210 La. 78, 174 A. L. R. 1366; *United States v. Yates* (Tex. 1947), 204 S. W. (2) 399. These cases, distinguishing the *Mackenzie* case (C. C. 9, Cal.) 109 Fed. (2) 540, proceed upon the theory that the nature of the rights flowing from an attachment must be determined by the law of the state. *Spokane County v. United States*, 279 U. S. 80, 73 L. Ed. 621; *United States v. Waddill*, 323 U. S. 353, 89 L. Ed. 294; *New Orleans v. Harrell*, 134 Fed. (2) 399; *United States v. Texas*, 314 U. S. 480, 86 L. Ed. 356, cited in *Louisiana University* case, *supra*. The same rule was applied to liens under Sec. 3466 (U. S. C. Sec. 191, Title 31) for "debts due to the United States." *United States v. Canal Bank* (C. C. Me.), 3 Story 79, Fed. Cas. No. 14,715; *U. S. v. Collins* (C. C. N. Y.), Fed. Cas. No. 14,834; *U. S. v. Mechanics Bank* (D. C. Pa.), Fed. Cas. No. 15,756; *Hopkins vs. Duffy* (Pa.), 9 Lanc. Bar 125; *United States v. Acres* (Mo. 1947), 73 Fed. Sup. 820.

It was also ruled by the Attorney General (1823), 1 Op. A. G. 616, that the priority of the United States cannot reach back over any valid lien, whether it be general or specific.

In the instant case *there is no lack of specificity in the lien perfected by the attachment; the moneys and se-*

*curities have been specifically levied on and the attachment lien affected as provided by statute, before the Government has taken any steps to assert its lien.*

#### **PRIORITY OF "DEBT DUE UNITED STATES."**

Section 3466 of the Revised Statutes, 31 U. S. C. A. sec. 191, provides that all debts owed to the government shall have a prior right to being paid first. This statute is wholly inapplicable, because at the time we obtained our levy under the attachment there was no debt due the United States for income taxes, nor lien effected therefor under the provisions of the Internal Revenue Act, sections 3670, 3671 and 3672, 26 U. S. C. A. No priority or lien for the tax could be claimed until the collector of internal revenue has received the assessment list, made demand for payment upon the taxpayer, and filed the notice of lien at the office of the county recorder. In our case all of this statutory procedure was subsequent to the attachment and therefore no debt or lien existed in favor of the government at the time our attachment was perfected.

Furthermore, the priority provided by section 3466 applies only to insolvency cases. It has been held that this section does not give priority to a tax claim, or creates a lien in favor of the Government, in the absence of insolvency of the taxpayer. *Winston-Salem v. Powell Paving Co.* (1937), 7 Fed. Supp. 424; *Bishop v. Black* (1951), 64 S. E. (2) 167; *Re Rowe Bros.*, 18 Fed. (2) 658; *Tildestly Coal Co. v. American Fuel Corp.* (1947), 130 W. Va. 720, 45 S. E. (2) 750; *U. S. v. Fisher*, 2 Cranch. 358, 2 L. Ed. 304, opinion by Marshall, C.J. See also 6 *Am. Jur.* p. 873, sec. 548 and cases in Annotation 83 L. Ed. 1239, where liens obtained by execution levies were held superior to the claim of the United States for income taxes. In Ohio, as previously shown, an attachment is treated as an execution in advance.

### OPERATIVE EFFECT OF ATTACHMENT LIEN.

It is well recognized in the great majority of jurisdictions that an attachment properly obtained either by seizure or garnishment proceedings creates a specific lien which operates on the property concerned from the date of service of the writ of attachment. 7 *Corpus Juris Secundum*, Sections 254, 255, p. 430 *et seq.*; 5 *American Jurisprudence*, Section 825, p. 93. In Ohio this rule clearly prevails by force of the provisions of Ohio General Code Section 11837, that "*an order of attachment shall bind the property attached from the time of service.*"

This statutory rule was recognized and reiterated in *Ohio Auxiliary Fire Alarm Co. v. Heisley* (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691, wherein the first syllabus provides in part:

"The service of a writ of garnishment upon a party claimed to be indebted to the defendant binds in his hands the property he may have belonging to the defendant at the time he is served with the writ."

And in *Malkey v. Ruggles* (1923), 24 O. N. P. (N. S.) 433, 434, it was stated that "under the provisions of General Code an attachment is a lien from the time of seizure."

The Supreme Court of Ohio at a very early date announced the rule that contests involving priorities between attachment and other lien claims were to be determined by application of the maxim, "*qui prior est tempore potior est jure.*" *Shorten v. Drake* (1882), 38 Ohio St. 76. It was followed by Justice Minton in the *New Britain* case (Adv. Rep. U. S. L. Ed. Vol. 98, p. 289). This priority of time rule has been applied in holding an attachment lien to be superior to a subsequently issued execution. *Malkey v. Ruggles*, 24 O. N. P. (N. S.), 433. It has also been held that an attachment lien is superior to an unrecorded mort-

gage. *Wright, et al. vs. Franklin Bank, et al.*, 59 Ohio St. 80.

From the foregoing it appears indisputable that the attachment lien of the administrator is superior to the general lien of the United States for income taxes in the instant matter since the attachment lien was obtained some three months before the Collector of Internal Revenue either received the assessment lists, demanded payment of delinquent taxes from Aciri, or filed the applicable Notice of Tax Lien. This concept has been applied in the following decisions which concern the precise question presented herein.

In the case of *Louisiana State University vs. Hart*, (Louisiana Supreme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, the University brought suit for \$75,000 on an alleged overpayment for furniture purchased from one Smith. The suit was filed on July 25, 1939, and a writ of attachment was issued the same day.

On February 13, 1940, the United States Commissioner assessed income taxes, penalties and interest in the amount of some \$305,000 against Smith for the years 1936, 1937 and 1938. On February 15, 1940, the Collector of Internal Revenue received the Commissioner's assessment list and on the following day filed proper notices of tax liens. Subsequent to this time the University recovered judgment in the amount of \$25,000 against Smith.

In the suit which ensued on the question of the priority of the University's lien over that of the Government's for income taxes, the Court held as follows in the fourth syllabus of the A. L. R. report:

"A federal tax lien for income taxes and penalties arising between the date of attachment of the tax debtor's property and the date of judgment, which maintained it, is subordinate to the lien resulting from

the attachment, and the attaching creditor is to be preferred to the United States in the disposition of the proceeds of the property seized under the writ of attachment."

In the case of *United States v. Yates* (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399, the plaintiff, Yates, brought an action to recover judgment against one Russell, for amounts due for rent of equipment and labor on a construction job. The United States intervened, claiming prior liens on the basis of Russell's delinquent taxes. The facts reported disclosed that Yates perfected an attachment lien on May 15, 1944, while the Government did not file its Notice of Tax Lien until May 26, 1944. The Court, in affirming judgment for Yates on his attachment lien, held in the second syllabus:

"A specific attachment lien, levied on airport construction contractor's property before date on which Federal Government fixed its tax lien on proceeds of sale of attached property, was entitled to priority over government's lien, though attaching creditor's claims were not reduced to judgment."

In this regard it will be noted that in *Louisiana State University v. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, *supra*, the Court at page 1370, A. L. R. report, said:

"The United States relies on the case of *Mackenzie v. United States*, 109 F. (2d) 540, but a reference to that case shows that the lien of the government arose prior to the issuance of the attachment, while in this case it arose subsequent to the attachment."

And in *United States v. Yates*, 204 S. W. (2d) 399, *supra*, the same distinguishing factor is both apparent and was noted by the court.

## CONCLUSION.

The undisputed facts developed in this case clearly establish that by virtue of the defendant administrator's diligence in attempting to protect the rights of the beneficiaries of his decedent's estate,—he has succeeded in establishing a valid lien under the law of the State of Ohio to the extent of \$18,500, which is prior in time not only to the lien of the United States provided for under the Internal Revenue Code, but prior to any assessment and demand made against Acri for his delinquent income taxes. The administrator's lien, as thus established, being prior in time, is therefore prior in right under the established law.

The Government is relying upon the opinion of Mr. Justice Minton in *United States v. Security Trust, supra*. Sufficeth to say that there was no appearance or briefs filed on behalf of the defense in that action, the proceedings there before the Supreme Court were absolutely *ex parte*.

The lien under the Ohio law is absolute and not contingent upon being enforced within three years as provided by the California Statute. To apply the California law in the instant case would amount to a repeal and annulment, by judicial fiat, of the Ohio statutes relating to priorities of lien in attachment cases, contrary to the well established principles by the decisions of both the Supreme Courts of the United States and the State of Ohio. (See Conformity Rule 64, Rules of Civil Procedure, U. S. C. A. Title 28.)

In the words of the District Court:

“Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837. *Illinois v. Campbell, supra*.

The subsequent receipt of the assessment list by the Collector and the filing of an income tax lien by him accords the Government's lien only second place. 26 U. S. C. Section 3671.

The case of *U. S. v. Security Trust and Savings Bank*, *supra*, relied upon the Government, dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute.

The Ohio courts have characterized the attachment lien under Ohio law as an 'execution in advance,' *Rempe & Son v. Ravens*, 68 O. S. 113; *Green v. Coit*, 81 O. S. 280, and accord it equal standing with an execution lien. *Shorten v. Drake*, 38 O. S. 76. Thus they treat the attachment lien as perfected at the time the attachment is made.

In the interest of orderly administration of justice in matters of concurrent jurisdiction, this Court should respect the state court's characterization of the attachment lien under Ohio law."

This case differs from the case of *United States v. Gilbert Associates*, 345 U. S. 361, where a specific federal tax lien was given priority over a general town lien for taxes in the distribution of an insolvent estate; or the *Security Trust case*, 340 U. S. 47, where no lien existed under the California law in an attachment of personal property; or the *New Britain case* (Advance Reports of U. S. Supreme Court, Law Edition, Vol. 98, p. 289), where the federal lien was perfected before the statutory lien of a city, the Supreme Court in the latter case basing its decision on the principle of "first in time, first in right."

Since justice must be equal to all, it would seem that the principle should be equally applied to the attachment lien here, perfected and lodged against specific property long before any steps have been taken by the government to assert its claim. The very language of Mr Justice

Minton in the *New Britain* case, *supra*, that "a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds," permits no other conclusion. He further observed that "Congress had this cardinal rule in mind when it enacted Section 3670." The Government had neither a debt nor lien at the time the property was attached. No federal question decided in conflict with applicable decisions of this Court, as contemplated by Rule 38 of this Court, is here involved and the petition for certiorari should accordingly be denied.

Respectfully submitted,

JOHN A. WILLO,  
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Edward Oravitz, Respondent.*

OCT 22 1954

HAROLD B. WILCOY, Clerk

# In the Supreme Court of the United States

OCTOBER TERM, 1954.

**No. 33.**

UNITED STATES OF AMERICA,

*Petitioner,*

v.

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE  
DOLLAR SAVINGS & TRUST CO. OF YOUNGSTOWN, OHIO,  
GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and  
EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF  
JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.

**BRIEF OF RESPONDENT, EDWARD ORAVITZ,  
ADMINISTRATOR OF THE ESTATE OF JOHN  
ORAVITZ, DECEASED.**

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## TABLE OF CONTENTS.

STATEMENT OF FACTS .....	1
ARGUMENT .....	3
Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and re- corded subsequently to the date of the attach- ment lien .....	3
Nature of attachment lien under Ohio statutes .....	3
No inchoacy of lien under Ohio statutes .....	5
Inapplicability of California law .....	8
Priority of attachment lien .....	9
Priority of "debt due United States" .....	12
Operative effect of attachment lien .....	13
Statute cannot be construed to displace valid subsisting liens .....	16
Federal courts follow state law in attachment cases .....	17
Pre-emption of jurisdiction by state court .....	18
CONCLUSION .....	19
APPENDIX A (ADDITIONAL PORTIONS OF RECORD) .....	23
Defendant's Exhibit A. Judgment of Common Pleas Court in the Case of Oravitz v. Acri .....	23
Plaintiff's Exhibit 1. Notice of Tax Lien Under Internal Revenue Laws .....	25
Plaintiff's Exhibit 2. Notice of Levy .....	27
APPENDIX B (STATUTES) .....	28
Page's Ohio General Code .....	28
California Code, Section 542 (a) .....	28
Internal Revenue Code .....	29

## TABLE OF AUTHORITIES.

### Federal Courts.

<i>Bernstein v. Heyghen Ferres Societe</i> (C. C. A. 2 1947), 163 Fed. (2) 246 .....	17
<i>Carswell Construction Co., Re</i> , 13 Fed. (2) 667.....	11
<i>Crowther v. Fidelity Insurance Co.</i> , 85 Fed. 41.....	17
<i>Domenech v. Lee</i> , 66 Fed. (2) 31, certiorari dismissed 290 U. S. 708 .....	16-17
<i>Erie R. R. v. Tompkins</i> , 304 U. S. 64, 84 L. Ed. 1188...	17
<i>Freeman v. Howe</i> , 24 How. 450, 16 L. Ed. 749.....	19
<i>Gustin v. Sunlife Assn.</i> (C. C. A. 6th) 154 Fed. (2) 921 .....	17
<i>Illinois v. Campbell</i> , 329 U. S. 362, 91 L. Ed. 348.....	10
<i>Mackenzie v. United States</i> (C. C. A. 9th, 1940), 109 F. (2d) 540 .....	11
<i>Met-Woods Products v. Sparks-Withington Corp.</i> (D. C. Mich. 1947), 74 Fed. Supp. 979 .....	17
<i>Molton v. Missouri</i> , 295 U. S. 97, 79 L. Ed. 1327.....	19
<i>New Orleans v. Harrell</i> , 134 Fed. (2) 399 .....	11
<i>Princess Lida v. Thompson</i> , 305 U. S. 456, 83 L. Ed. 285 .....	19
<i>Pulliam v. Osborne</i> , 17 How. 471, 15 L. Ed. 154.....	19
<i>Rankin v. Scott</i> , 25 U. S. 177, 12 Wheaton 177.....	9
<i>Rowe Bros., Re</i> , 18 Fed. (2) 658 .....	12
<i>Security First National Bank v. Rindge Land and Navigation Co.</i> , 85 Fed. (2) 557, 107 A. L. R., 1240, certiorari denied 299 U. S. 613, 300 U. S. 686 .....	16

<i>Spokane County v. United States</i> , 279 U. S. 80, 73 L. Ed. 621 .....	11
<i>Swift v. Tyson</i> , 16 Pet. 1, 10 L. Ed. 865 .....	17
<i>United States v. Acres</i> (Mo. 1947), 73 Fed. Sup. 820 .....	11
<i>U. S. v. Acri, et al., etc.</i> , 109 Fed. Sup. 943, 209 Fed. (2) 258 .....	6
<i>United States v. Bank of New York</i> , 296 U. S. 463, 80 L. Ed. 331 .....	19
<i>United States v. Canal Bank</i> (C. C. Mo.), 3 Story 79, Fed. Cas. No. 14,715 .....	11
<i>U. S. v. Collins</i> (C. C. N. Y.), Fed. Cas. No. 14834 .....	11
<i>U. S. v. Fisher</i> , 2 Cranch. 358, 2 L. Ed. 304 .....	12
<i>United States v. Gilbert Associates</i> , 345 U. S. 361 .....	21
<i>United States v. Knott</i> , 298 U. S. 544 .....	10, 16
<i>U. S. v. Martin Fireproofing Corp.</i> (C. C. Ohio 1948), 168 Fed. (2) 808 .....	11
<i>U. S. v. Mechanics Bank</i> (D. C. Pa.), Fed. Cas. No. 15,756 .....	11
<i>United States v. New Britain</i> , 347 U. S. 81 .....	9, 13, 21
<i>United States v. Security Trust</i> (1950), 340 U. S. 47, 95 L. Ed. 53 .....	4, 5, 8, 19, 21
<i>United States v. Texas</i> , 314 U. S. 480, 86 L. Ed. 356 .....	11
<i>United States v. Waddill</i> , 323 U. S. 353, 89 L. Ed. 294 .....	11
<i>Vandenbark v. Glass Co.</i> , 311 U. S. 538, 85 L. Ed. 327 .....	17
<i>West v. American Telephone Co.</i> , 311 U. S. 538, 85 L. Ed. 139, 132 A. L. R. 956, 19 O. Op. 77 .....	17
<i>Winston-Salem v. Powell Paving Co.</i> (1937), 7 Fed. Supp. 424 .....	12

### Ohio Courts.

<i>Alsdorf v. Reed</i> , 45 Ohio St., 653 .....	7
<i>Benedict v. Peters</i> , 58 O. S. 527 .....	5
<i>Green v. Coit</i> (1909), 81 Ohio St., 280 .....	6
<i>James Ward &amp; Co. v. Howard</i> (1861), 12 O. S., 158 .....	6
<i>Liebman v. Ashbaker</i> , 36 O. S. 94 .....	4
<i>Malkey v. Ruggles</i> (1923), 24 O. N. P. (N. S.) 433 .....	13
<i>McCombs v. Howard</i> , 18 O. S. 422 .....	4
<i>Ohio Auxiliary Fire Alarm Co. v. Heisley</i> (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691 .....	13
<i>Oil Well Supply Co. v. Koen</i> , 64 O. S. 568 .....	4
<i>Pilgrim Distributing Corp. v. Galsworthy</i> , 148 O. S. 567 .....	4
<i>Rempe v. Ravens</i> , 68 O. S. 113 .....	4, 6
<i>ROCO HOMES, Re</i> (1942), 23 O. Op. 516 .....	17
<i>Shorten v. Drake</i> (1882), 38 Ohio St. 76 .....	13
<i>St. John v. Parson</i> , 54 O. App. 420 .....	4
<i>Wright, et al. v. Franklin Bank, et al.</i> , 59 Ohio St. 80 .....	14

### Other State Courts.

<i>Bishop v. Black</i> (1951), 64 S. E. (2) 167 .....	12
<i>Hopkins v. Duffy</i> (Pa.), 9 Lanc. Bar 125 .....	11
<i>Louisiana State University v. Hart</i> (Louisiana Su- preme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366 .....	11, 14, 15
<i>Tildestly Coal Co. v. American Fuel Corp.</i> (1947), 130 W. Va. 720, 45 S. E. (2) 750 .....	12
<i>United States v. Yates</i> (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399 .....	11, 15

## Texts and Opinions.

5 <i>Am. Jur.</i> p. 87, sec. 815 .....	3, 16
5 <i>Am. Jur.</i> Section 825, p. 93 .....	13
6 <i>Am. Jur.</i> p. 873, sec. 548 .....	12
12 <i>Am. Jur.</i> , p. 86, Sec. 443 .....	16
<i>Annotation</i> , 83 L. Ed. 1239 .....	12
7 <i>Corpus Juris Secundum</i> , Sections 254, 255, p. 430 et seq. ....	13
16 <i>C. J. S.</i> , p. 87, Sec. 815 .....	17
4 <i>O. Jur.</i> p. 201, sec. 158 .....	4
4 <i>O. Jur.</i> p. 202, sec. 159 .....	5
4 <i>O. Jur.</i> p. 248, secs. 190 to 192 .....	5
4 <i>O. Jur.</i> p. 250, sec. 192 .....	5
5 <i>O. Jur.</i> pp. 657, 658 .....	7
5 <i>O. Jur.</i> p. 663, Sec. 316 .....	6
11 <i>O. Jur.</i> p. 136, sec. 782 .....	17
14 <i>O. Jur.</i> p. 444, sec. 249 .....	18
1 <i>Op. A. G.</i> 616 .....	11

## Statutes.

### Deering's California Code of Civil Procedure (1949):

Sec. 537 .....	8
Sec. 542a .....	5, 8, 28
Sec. 542b .....	8

### Internal Revenue Code:

Sec. 3670 (26 U. S. C., 1946 ed., Sec. 3670) .....	12, 16, 29
Sec. 3671 (26 U. S. C., 1946 ed., Sec. 3671) .....	12, 29
Sec. 3672 (26 U. S. C., 1946 ed., Sec. 3672) .....	12, 29

Ohio General Code:

Sec. 11819 (R. C. 2715.01)	28
Sec. 11837 (R. C. 2715.19)	3, 4, 8, 13, 28
Sec. 11858 (R. C. 2715.40)	5
Sec. 11859 (R. C. 2715.41)	5

Revised Statutes:

Sec. 3466 (31 U. S. C., 1946 ed., Sec. 191)	11, 12
---	--------

Rules of Civil Procedure, Conformity Rule 6a (28 U. S. C. A.)	17, 20
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Rule 38 of the United States Supreme Court	14
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# In the Supreme Court of the United States

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OCTOBER TERM, 1954.

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UNITED STATES OF AMERICA,

*Petitioner,*

v.

MICHAEL P. ACRI, DOLLAR SAVINGS & TRUST CO., THE  
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GUARDIAN OF THE ESTATE OF MICHAEL P. ACRI, and  
EDWARD ORAVITZ, ADMINISTRATOR OF THE ESTATE OF  
JOHN ORAVEC, a.k.a., ORAVITZ, DECEASED.

---

**BRIEF OF RESPONDENT, EDWARD ORAVITZ,  
ADMINISTRATOR OF THE ESTATE OF JOHN  
ORAVITZ, DECEASED.**

---

The Circuit Court of Appeals for the Sixth Circuit affirmed a judgment of the U. S. District Court for the Northern District of Ohio, Eastern Division, declaring an attachment lien, duly perfected in a State court action for wrongful death and resulting in judgment therein, to be superior to a lien for income taxes filed subsequent to the attachment, the District Court following the Ohio law that such attachment is an "execution in advance" under the Ohio statutes and superior to liens subsequently filed.

**STATEMENT OF FACTS.**

On February 17, 1947, Michael P. Acri shot and killed John Oravec while the latter was partaking of refreshments at the Acri Tavern. Found guilty of murder, he was sentenced to a life term at the Ohio State Penitentiary.

Surviving are Oravec's parents, of whom he was the sole support.

Acri and his wife were possessed of considerable property; but the most liquid assets were cash savings and Government bonds contained in a safe-deposit box at the vault of the Dollar Savings and Trust Company in the name of Acri, discovered by Mr. John Willo, Counsel for the administrator of the Oravec estate.

On **August 6th, 1947**, suit for wrongful death was filed in the Court of Common Pleas of Mahoning County, and on the same day an attachment of the funds and securities at the Dollar Savings and Trust Co. was issued and service had on garnishee.

On **January 19, 1949**, on trial before Judge Doyle, judgment in the sum of \$18,500 was rendered in favor of the administrator suing on behalf of Oravec's parents. The journal entry reads in part:

"The Court further finds that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Co. of Youngstown, Ohio: that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947, and for the full payment and satisfaction of the judgment entered herein."

Subsequent to the attachment for wrongful death on **August 6th, 1947**, the Commissioner for Internal Revenue had assessed taxes against Acri for the years 1942 to 1946. The assessment list covering these taxes was received by the Collector of Internal Revenue, and Demand for Payment was mailed to Acri on **November 11, 1947**.

On November 21, 1947, a tax lien was filed in the office of Recorder of Mahoning County, Ohio, and on the same date notice of tax lien and notice of levy were served upon The Dollar Savings & Trust Company.

On June 14, 1948, The Dollar Savings & Trust Company was appointed guardian of the estate of Michael P. Aciri, who had been incarcerated upon his conviction for the murder of Oravec.

### ARGUMENT.

Whether the lien of an attaching creditor under the provisions of the Ohio Statutes has priority over Federal tax liens assessed, levied and recorded subsequently to the date of the attachment lien.

#### NATURE OF ATTACHMENT LIEN UNDER OHIO STATUTES.

The nature of an attachment has been stated to be a "direct appropriation by authority of law of specific property of the debtor, for the purpose of satisfying the demand, and the *lien thereby created is substantial and enduring, as much as a mortgage or pledge.*" 5 Am. Jur. p. 87, Sec. 815.

The Ohio General Code, section 11837 (R. C. 2715.19) provides:

"An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, from the time he is served with the written notice."

The absoluteness of an attachment lien under the Ohio statute, as distinguished from being a mere inchoate

right to lien or *lis pendens*, is stated by the Ohio Supreme Court in *Rempe v. Ravens*, 68 O. S. 113 at 128:

"The writ of attachment or garnishment is in the nature of an 'execution in advance' and the office and purpose of such writ is to hold and bind the property seized until final judgment in the attachment proceeding, and if upon final hearing in the attachment suit judgment is rendered in favor of the plaintiff, the effect of such judgment is to give plaintiff the right to enforce any lien he shall have acquired by his attachment or garnishment against whatever interest the defendant may have in the property attached or garnished."

The opinion of Justice Minton in *United States v. Security Trust* (1950), 340 U. S. 47, 95 L. Ed. 53, founded on the California statute and the decisions construing it, does not harmonize with the laws of Ohio. There is no decision in Ohio which holds an attachment lien to be only a contingent or inchoate right, a mere *lis pendens*, which gives it no priority over a subsequent lien. An attachment in Ohio is considered a proceeding in rem, the lien whereof prevails over subsequent liens unless released or the main action dismissed. *Pilgrim Distributing Corp. v. Galsworthy*, 148 O. S. 567; *St. John v. Parson*, 54 O. App. 420; *Oil Well Supply Co. v. Koen*, 64 O. S. 568. "The attaching creditor acquires from the levy a right to have the property held by the attaching officer, and under subsequent order, a right to have the property sold." 4 O. Jur. p. 201, sec. 158.

When an order of attachment is issued and executed by seizure, the levy gives rise to a lien. The General Code of Ohio, Sec. 11837 (R. C. 2715.19), specifically provides that "an order of attachment shall bind the property attached from the time of service." *Liebman v. Ashbaker*, 36 O. S. 94; *McCombs v. Howard*, 18 O. S. 422. "The lien

of the attachment does not depend upon the sufficiency of the affidavit, but upon the taking of the property under the writ." *Benedict v. Peters*, 58 O. S. 527 at 536; 4 O. Jur. p. 202, sec. 159.

The procedure of determining priorities in attachment cases is provided by Sec. 11858, G. C. (R. C. 2715.40) of Ohio. A trial of the claimant's right to the property can be had only at the instance of such claimant. 4 O. Jur. p. 250, sec. 192. Section 11859 G. C. (R. C. 2715.41) of Ohio further provides:

"When several attachments are executed on the same property, or the same person is made garnishee by several parties, on motion of any of the plaintiffs the court may order a reference to ascertain and report the amounts and priorities of the several attachments."

#### **NO INCHOACY OF LIEN UNDER OHIO STATUTES.**

Counsel for the Government attempt in their brief to foist on this honorable court the wrong concept that an attachment in Ohio creates no lien on the property attached, and is merely a caveat or *lis pendens* as regarded by the courts of California under the California statute and followed by Mr. Justice Minton in the *Security Trust* case, 340 U. S., 47. The Government in its brief states:

"It is clear that an attachment under Ohio law does not give to plaintiff a choate lien—that it is a mere *lis pendens* notice that a right to perfect a lien exists."

We wish here to emphasize that this statement of the Ohio law is wholly inaccurate, and that there is no such thing in that state as an inchoate attachment lien; nor is there any similarity in the decisions of Ohio and California as to the nature of such lien under the statutes of these respective states.

Equally so is the smear on the state judge on page 7 of the Government's brief—a man known for his fairness and integrity—that the damages awarded for the wrongful death of the young man killed by Acri were speculative and conjectural.

An attachment lien validly obtained under the Ohio law creates a property right which cannot be displaced by subsequent liens. A levy in that state under an order of attachment or garnishment confers upon the attaching creditor a lien with respect to the property attached which will prevail over all subsequent liens. The rule prevailing in Ohio is stated in the 1954 edition of *Ohio Jurisprudence*, Vol. 5, p. 663, Sec. 316:

“Contests between attachment, and other rights, titles, or encumbrances, are determined as a general rule by priority in time by applying the maxim ‘qui prior est tempore potior est jure.’ The priority of an *attachment lien* depends not when the order of attachment is made but at the time of service \* \* \*. It is a general rule that the *attachment lien* is superior to all subsequent rights, titles, and encumbrances.” (Emphasis added.)

It is on this principle that the district court judge, in the case at bar, rested his opinion (109 Fed. Supp. 943), which was affirmed by the Circuit Court of Appeals (209 Fed. (2) 258).

From the earliest time, as well as currently, the provisional remedy of attachment is regarded by the courts of Ohio in the nature of an ‘execution in advance.” *James Ward & Co. v. Howard* (1861), 12 O. S., 158; *Rempe v. Ravens* (1903), 68 Ohio St., 113, at 128; *Green v. Coit* (1909), 81 Ohio St., 280, at 285. In the latter case the Supreme Court of Ohio stated:

“Attachment is an extraordinary remedy; it is in the nature of an execution before judgment; by

means of it the rights of a party may be determined without service of process upon him and even without his knowledge; it is intended to create a *lien* on the property of the defendant, authorized only by statute." (Emphasis added.)

As to the nature of the right acquired by an attaching creditor under the statutes of Ohio, the text in *Ohio Jurisprudence*, 1954 edition, Vol. 5, pp. 657, 658, further states:

"Garnishment renders the garnishee 'liable' to the attachment plaintiff. By service of garnishee process the attachment plaintiff acquires a right in respect to property or credits of the defendant which are in the hands of the garnishee. *This right is generally regarded as in the nature of a lien* upon the title or right of action of the defendant. Garnishment holds the garnishee to a personal liability and gives the attaching creditor a *lien* on a debt so far as to restrain the garnishee from paying it over to the original debtor. \* \* \* A garnishing creditor acquires such an interest in the property subject to the garnishment that where such is the subject of litigation in another court the creditor is entitled to intervene to protect his interest. The *lien* or right which the attaching creditor acquires by garnishment extends to all property of the defendant in the hands of the garnishee and to money and credits due from him to the defendant."

It has been further held that the legal effect of a garnishment order in an attachment proceedings, where judgment is rendered for the plaintiff, is to transfer the indebtedness of the garnishee to the plaintiff in the attachment so far as the same may be necessary to satisfy his judgment, with the right to foreclose mortgages seized under the garnishment order, in the same manner as if acquired by an assignment. *Alsdorf v. Reed*, 45 Ohio St., 653.

### INAPPLICABILITY OF CALIFORNIA LAW.

The California attachment statute differs materially from the one in Ohio and the decisions interpreting the former have no application to the latter. The California Code of Civil Procedure, section 537, subjects the property attached "as security for the satisfaction of any judgment that may be recovered," whereas the Ohio statute, G. C. 11837 (R. C. 2715.19), provides that "an order of attachment shall bind the property attached from the time of service." No lien is expressly provided by the California statute when the property attached is personal property, although a lien is provided by section 542a when the attachment is on real property, upon the recording of a copy of the writ together with a description of the property attached. As to attachments on personal property, section 542b provides:

"An attachment or garnishment of personal property \* \* \* shall cease to be of any force and effect and the property levied on be released from the attachment or garnishment at the expiration of three years after the issuance of the writ of attachment under which said levy was made."

Construing the California statute in an attachment on real property, in the case of *United States v. Securities Trust and Savings Bank, etc.*, 340 U. S. 47, 95 L. Ed. 53, Mr. Justice Minton stated:

"The attachment lien gives the attachment creditor no right to proceed against the property unless he gets judgment within three years or within such extension as the statute provides. Numerous contingencies might arise that would prevent the attachment lien from ever becoming perfected by a judgment awarded and recorded \* \* \*. He had a mere caveat of a more perfect lien to come."

Inasmuch as the Government depends upon the decision of the above cited California case, we believe it will aid the Court for us, at this time, to quote further from Mr. Justice Minton's decision:

"The effect of a lien in relation to a provision of federal law for the collection of debts owing the United States is always a federal question. Hence, although a state court's classification of a lien as specific and perfected is entitled to weight, it is subject to re-examination by this Court. On the other hand, if the state court itself describes the lien as inchoate, this classification is 'practically conclusive.' *Illinois vs. Campbell*, 329 U. S. 362, 371. The Supreme Court of California has so described its attachment lien in the case of *Puisseur vs. Yarbrough*, 29 Calif. 2d 409, 412, by stating that 'the attaching creditor obtains only a potential right or a contingent lien.' Examination of the California statute shows that the above is an apt description. \* \* \*"

#### PRIORITY OF ATTACHMENT LIEN.

The rule that a lien prior in time is prior in right has been consistently followed by this honorable court since the time of the immortal Marshall. In *Rankin v. Scott*, 25 U. S. 177, 12 Wheaton 177 at 179, Chief Justice Marshall stated:

"The principle is believed to be universal, that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds, unless the lien be intrinsically defective, or be displaced by some act of the party holding it, which shall postpone him in a court of law or equity to a subsequent claimant."

Mr. Justice Minton, following this pronouncement in the recent case of *United States v. New Britain*, 347 U. S. 81, said:

"This principle is widely accepted and applied, in the absence of legislation to the contrary. 33 American Jurisprudence, Liens, Sec. 33; 53 C. J. S., Liens, Sec. 106. We think that Congress had this cardinal rule in mind when it enacted Sec. 3670, a schedule of priority not being set forth therein. Thus, the priority of each statutory lien contested here must depend on the time it attached to the property in question and became choate."

The principle applies equally to the attachment plaintiff here, who perfected his lien on specific property long before the Government knew it had any claim against the owner of the attached property, and long before it had commenced proceedings to assert its lien under the provisions of the Internal Revenue Act.

The cases cited by opposing counsel on priority of "debts due the United States" have no application. Such priority must rest on the debtor's insolvency and must relate to property belonging to his estate. "If, therefore, before the preference has accrued to the United States the debtor has made a bon fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, *or if his property has been seized under a fi. fa.*, the property is divested out of the debtor and cannot be made liable to the United States." *United States v. Knott*, 298 U. S., 544, at 549, Opinion by Brandeis, J.

In *Illinois v. Campbell*, 329 U. S. 362, 91 L. Ed. 348, this honorable court held that it would follow the decisions of state courts on the question of inchoacy of lien, but intimated that it would not accord priority to a claim of the United States for taxes over a lien asserted against the assets of an insolvent debtor which is definite as respects the identity of the lienor, the amount of the lien, and the property to which it attaches. All these prerequisites were present as far as the attachment lien here is concerned.

The holder of a mechanic's lien was held in the Taylorcraft case, *U. S. v. Martin Fireproofing Corp.* (C. C. Ohio 1948), 168 Fed. (2) 808, to have priority over a subsequent income tax lien. See also *Re Carswell Construction Co.*, 13 Fed. (2) 667. Other decisions of similar effect and similarly give an attachment lien, perfected prior to the filing of an income tax lien, priority over the latter; *Louisiana State University v. Hart* (1946), 210 La. 78, 174 A. L. R. 1366; *United States v. Yates* (Tex. 1947), 204 S. W. (2) 399. These cases, distinguishing the *Mackenzie* case (C. C. 9, Cal.) 109 Fed. (2) 540, proceed upon the theory that the nature of the rights flowing from an attachment must be determined by the law of the state. *Spokane County v. United States*, 279 U. S. 80, 73 L. Ed. 621; *United States v. Waddill*, 323 U. S. 353, 89 L. Ed. 294; *New Orleans v. Harrell*, 134 Fed. (2) 399; *United States v. Texas*, 314 U. S. 480, 86 L. Ed. 356, cited in *Louisiana University* case, *supra*. The same rule was applied to liens under Sec. 3466 (U. S. C. Sec. 191, Title 31) for "debts due to the United States." *United States v. Canal Bank* (C. C. Me.), 3 Story 79, Fed. Cas. No. 14,715; *U. S. v. Collins* (C. C. N. Y.), Fed. Cas. No. 14,834; *U. S. v. Mechanics Bank* (D. C. Pa.), Fed. Cas. No. 15,756; *Hopkins vs. Duffy* (Pa.), 9 Lanc. Bar 125; *United States v. Acres* (Mo. 1947), 73 Fed. Sup. 820.

It was also ruled by the Attorney General (1823), 1 Op. A. G. 616, that the priority of the United States cannot reach back over any valid lien, whether it be general or specific.

In the instant case there is no lack of specificity in the lien perfected by the attachment; the moneys and securities have been specifically levied on and the attachment lien affected as provided by statute, before the Government has taken any steps to assert its lien.

**PRIORITY OF "DEBT DUE UNITED STATES."**

Section 3466 of the Revised Statutes, 31 U. S. C. A. sec. 191, provides that all debts owed to the government shall have a prior right to being paid first. This statute is wholly inapplicable, because at the time we obtained our levy under the attachment there was no debt due the United States for income taxes, nor lien effected therefor under the provisions of the Internal Revenue Act, sections 3670, 3671 and 3672, 26 U. S. C. A. No priority or lien for the tax could be claimed until the collector of internal revenue has received the assessment list, made demand for payment upon the taxpayer, and filed the notice of lien at the office of the county recorder. In our case all of this statutory procedure was subsequent to the attachment and therefore no debt or lien existed in favor of the government at the time our attachment was perfected.

Furthermore, the priority provided by section 3466 applies only to insolvency cases. It has been held that this section does not give priority to a tax claim, or creates a lien in favor of the Government, in the absence of insolvency of the taxpayer. *Winston-Salem v. Powell Paving Co.* (1937), 7 Fed. Supp. 424; *Bishop v. Black* (1951), 64 S. E. (2) 167; *Re Rowe Bros.*, 18 Fed. (2) 658; *Tiddestly Coal Co. v. American Fuel Corp.* (1947), 130 W. Va. 720, 45 S. E. (2) 750; *U. S. v. Fisher*, 2 Cranch. 358, 2 L. Ed. 304, opinion by Marshall, C.J. See also 6 *Am. Jur.* p. 873, sec. 548, and cases in Annotation 83-L. Ed. 1239, where liens obtained by execution levies were held superior to the claim of the United States for income taxes. In Ohio, as previously shown, an attachment is treated as an execution in advance.

### OPERATIVE EFFECT OF ATTACHMENT LIEN.

It is well recognized in the great majority of jurisdictions that an attachment properly obtained either by seizure or garnishment proceedings creates a specific lien which operates on the property concerned from the date of service of the writ of attachment. 7 *Corpus Juris Secundum*, Sections 254, 255, p. 430 *et seq.*; 5 *American Jurisprudence*, Section 825, p. 93. In Ohio this rule clearly prevails by force of the provisions of Ohio General Code Section 11837 (R. C. 2715.19) that "*an order of attachment shall bind the property attached from the time of service.*"

This statutory rule was recognized and reiterated in *Ohio Auxiliary Fire Alarm Co. v. Heisley* (Circuit Court of Cuyahoga County, 1893) 7 C. C. 483; 4 C. D. 691, wherein the first syllabus provides in part:

"The service of a writ of garnishment upon a party claimed to be indebted to the defendant binds in his hands the property he may have belonging to the defendant at the time he is served with the writ."

And in *Malkey v. Ruggles* (1923), 24 O. N. P. (N. S.) 433, 434, it was stated that "under the provisions of General Code an attachment is a lien from the time of seizure."

The Supreme Court of Ohio at a very early date announced the rule that contests involving priorities between attachment and other lien claims were to be determined by application of the maxim, "*qui prior est tempore potior est jure.*" *Shorten v. Drake* (1882), 38 Ohio St. 76. It was followed by Justice Minton in the *New Britain* case, 347 U. S. 81. This priority of time rule has been applied in holding an attachment lien to be superior to a subsequently issued execution. *Malkey v. Ruggles*, 24 O. N. P. (N. S.), 433. It has also been held that an attachment

lien is superior to an unrecorded mortgage. *Wright, et al. v. Franklin Bank, et al.*, 59 Ohio St. 80.

From the foregoing it appears indisputable that the attachment lien of the administrator is superior to the general lien of the United States for income taxes in the instant matter, since the attachment lien was obtained some three months before the Collector of Internal Revenue either received the assessment lists, demanded payment of delinquent taxes from Aciri, or filed the applicable Notice of Tax Lien. This concept has been applied in the following decisions which concern the precise question presented herein.

In the case of *Louisiana State University vs. Hart*, (Louisiana Supreme Court, 1946), 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, the University brought suit for \$75,000 on an alleged overpayment for furniture purchased from one Smith. The suit was filed on July 25, 1939, and a writ of attachment was issued the same day.

On February 13, 1940, the United States Commissioner assessed income taxes, penalties and interest in the amount of some \$305,000 against Smith for the years 1936, 1937 and 1938. On February 15, 1940, the Collector of Internal Revenue received the Commissioner's assessment list and on the following day filed proper notices of tax liens. Subsequent to this time the University recovered judgment in the amount of \$25,000 against Smith.

In the suit which ensued on the question of the priority of the University's lien over that of the Government's for income taxes, the Court held as follows in the fourth syllabus of the A. L. R. report:

"A federal tax lien for income taxes and penalties arising between the date of attachment of the tax debtor's property and the date of judgment, which maintained it, is subordinate to the lien resulting from

the attachment, and the attaching creditor is to be preferred to the United States in the disposition of the proceeds of the property seized under the writ of attachment."

In the case of *United States v. Yates* (Texas Court of Civil Appeals, 1947) 204 S. W. (2d) 399, the plaintiff, Yates, brought an action to recover judgment against one Russell, for amounts due for rent of equipment and labor on a construction job. The United States intervened, claiming prior liens on the basis of Russell's delinquent taxes. The facts reported disclosed that Yates perfected an attachment lien on May 15, 1944, while the Government did not file its Notice of Tax Lien until May 26, 1944. The Court, in affirming judgment for Yates on his attachment lien, held in the second syllabus:

"A specific attachment lien, levied on airport construction contractor's property before date on which Federal Government fixed its tax lien on proceeds of sale of attached property, was entitled to priority over government's lien, though attaching creditor's claims were not reduced to judgment."

In this regard it will be noted that in *Louisiana State University v. Hart*, 210 La. 78, 26 So. (2d) 361, 174 A. L. R. 1366, *supra*, the Court at page 1370, A. L. R. report, said:

"The United States relies on the case of *Mackenzie v. United States*, 109 F. (2d) 540, but a reference to that case shows that the lien of the government arose prior to the issuance of the attachment, while in this case it arose subsequent to the attachment."

And in *United States v. Yates*, 204 S. W. (2d) 399, *supra*, the same distinguishing factor is both apparent and was noted by the court.

**STATUTE CANNOT BE CONSTRUED TO DISPLACE  
VALID SUBSISTING LIENS.**

We have shown that an attachment lien is a property right, in the nature of a mortgage or pledge (5 *Am. Jur.*, p. 87, Sec. 815) and so regarded by the Ohio decisions. Congress never intended to displace valid prior liens by liens for income taxes subsequently obtained. The provision of Section 3670 of the Internal Revenue Code, that the indebtedness for an income tax "shall be a lien in favor of the United States upon all property and rights to property belonging to such person," could under no circumstances be construed as to embrace property which had been legally aliened or encumbered by the taxpayer, and no longer belonging to him except subject to the vested rights acquired therein by bona fide lienholders. *United States v. Knott*, 298 U. S., 544, at 549. To hold otherwise would be violative of the due process clause and equal protection of the laws as guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution.

Accordingly it is generally recognized, that an act of the legislature which postpones an existing valid lien and makes a subsequently created lien superior thereto is a law impairing vested property rights. See 12 *Am. Jur.*, p. 86, Sec. 443.

Thus it was held that the right of creditors holding secured obligations to retain their lien until the obligation is paid is a substantive property right, and depriving creditors of such right is violative of those constitutional guarantees. *Security First National Bank v. Rindge Land and Navigation Co.*, 85 Fed. (2) 557, 107 A. L. R. 1240, certiorari denied 299 U. S. 613, 300 U. S. 686. Similarly, a statute which makes assessments for workmen's compensation a lien superior to the lien of a mortgage. *Dome-*

*nech v. Lee*, 66 Fed. (2) 31, certiorari dismissed 290 U. S. 708; or a statute giving mining materialmen a lien superior to a prior mortgage lien. *Crowther v. Fidelity Insurance Co.*, 85 Fed. 41. And as stated in 16 C. J. S., p. 87, Sec. 815:

"Lien rights constitute property rights of which the lienor cannot be deprived without due process of law. Hence, any newly created lien, if given preference over other liens vested or in existence, constitutes a violation of the due process guaranty."

#### FEDERAL COURTS FOLLOW STATE LAW IN ATTACHMENT CASES.

It has been repeatedly held that Federal courts will follow decisions of state courts on questions of general common law or commercial law: *Erie R. R. v. Tompkins*, 304 U. S. 64, 84 L. Ed. 1188, overruling *Swift v. Tyson*, 16 Pet. 1, 10 L. Ed. 865; that they will follow decisions of intermediate appellate courts which the Supreme Court refused to review: *West v. American Telephone Co.*, 311 U. S. 538, 85 L. Ed. 139, 132 A. L. R. 956, 19 O. Op. 77; that they must apply state law as of the time judgment is rendered; *Vandenbark v. Glass Co.*, 311 U. S. 538, 85 L. Ed. 327; that in controversies involving liens the Federal court enforces the state law. *Re ROCO HOMES* (1942) 23 O. Op. 516; *Gustin v. Sunlife Assn.* (C. C. A. 6th) 154 Fed. (2) 921; 11 O. Jur., p. 136, sec. 782 and supplement.

The rule that Federal courts follow the state law in attachment and garnishment proceedings was followed in the recent cases of *Bernstein v. Heyghen Ferres Societe* (C. C. A. 2 1947), 163 Fed. (2) 246; *Met-Woods Products v. Sparks-Withington Corp.* (D.C. Mich. 1947), 74 Fed. Supp. 979. Rule 64, U. S. C. A. Title 28, replacing former section 726, specifically requires Federal courts to adopt

*the state law in attachment and garnishment cases, "in the manner provided by the law of the state in which the district court is held."*

#### **PRE-EMPTION OF JURISDICTION BY STATE COURT.**

There is a rule of pre-emption governing cases in which the State and Federal Courts have concurrent jurisdiction, stated in 14 *O. Jur.* p. 444, sec. 249, and supported by numerous authorities:

"The general rule that the authority of the court first acquiring jurisdiction, the parties being the same, must prevail applies in the case of Federal and state courts of concurrent jurisdiction, so that whichever court first obtains jurisdiction may retain it for the purpose of deciding every question in the cause. The Federal judiciary has no control over questions, when once the state courts have acquired jurisdiction, until the state has finally exhausted its judicial power over them by a final decision in its highest tribunal."

As to property in legal custody, it is there further stated, sec. 251:

"The general rule that when a court has once taken into its jurisdiction a specific thing, no court, except one having a supervisory control or superior jurisdiction in the premises, has the right to interfere with and change that possession applies in proceedings where such *jurisdiction is first acquired* in either a Federal court or a state court. Property in possession of one court is not liable to seizure on process from another court. \* \* \* Where one of the courts has thus secured possession or dominion of specific property, the suit in the coordinate jurisdiction to affect the same property should be stayed until the proceedings in the court which first obtained jurisdiction are concluded or until ample time for their termination has elapsed."

See *Molton v. Missouri*, 295 U. S. 97, 79 L. Ed. 1327 (State action prevailing over seizure for Federal taxes); *Princess Lida v. Thompson*, 305 U. S. 456, 83 L. Ed. 285 (Priority of jurisdiction assumed by state court); *United States v. Bank of New York*, 296 U. S. 463, 80 L. Ed. 331 (Jurisdiction assumed by state court in seizure of foreign property); *Pulliam v. Osborne*, 17 How. 471, 15 L. Ed. 154 (Priority of execution of state court judgment); *Freeman v. Howe*, 24 How. 450, 16 L. Ed. 749 (Priority of seizure under attachment).

Relying on these authorities we contend that the Federal Court has no jurisdiction over the controversy after jurisdiction assumed by the state court. The proper course is to stay or dismiss the action in the Federal Court and to set up the government's rights by intervention in the state action.

### CONCLUSION.

The undisputed facts developed in this case clearly establish that by virtue of the defendant administrator's diligence in attempting to protect the rights of the beneficiaries of his decedent's estate,—he has succeeded in establishing a valid lien under the law of the State of Ohio to the extent of \$18,500, which is prior in time not only to the lien of the United States provided for under the Internal Revenue Code, but prior to any assessment and demand made against Acri for his delinquent income taxes. The administrator's lien, as thus established, being prior in time, is therefore prior in right under the established law.

The Government is relying upon the opinion of Mr. Justice Minton in *United States v. Security Trust*, *supra*. Sufficeth to say that there was no appearance or briefs filed

on behalf of the defense in that action, the proceedings there before the Supreme Court were absolutely *ex parte*.

The lien under the Ohio law is absolute and not contingent upon being enforced within three years as provided by the California Statute. To apply the California law in the instant case would amount to a repeal and annulment, by judicial fiat, of the Ohio statutes relating to priorities of lien in attachment cases, contrary to the well established principles by the decisions of both the Supreme Courts of the United States and the State of Ohio. (See Conformity Rule 64, Rules of Civil Procedure, U. S. C. A. Title 28.)

In the words of the District Court Judge:

"Under Ohio law, Oravitz acquired a valid lien of the requisite specificity on Acri's property as of the date of the commencement of the attachment proceeding. Ohio General Code Section 11837 (RC 2715.19). *Illinois v. Campbell*, *supra*.

The subsequent receipt of the assessment list by the Collector and the filing of an income tax lien by him accords the Government's lien only second place. 26 U. S. C. Section 3671.

The case of *U. S. v. Security Trust and Savings Bank*, *supra*, relied upon the Government, dealt with a California statute giving no such effectiveness to attachment proceedings and liens as does the Ohio statute.

The Ohio courts have characterized the attachment lien under Ohio law as an 'execution in advance,' *Rempe & Son v. Ravens*, 68 O. S. 113; *Green v. Coit*, 81 O. S. 280, and accord it equal standing with an execution lien. *Shorten v. Drake*, 38 O. S. 76. Thus they treat the attachment lien as perfected at the time the attachment is made.

In the interest of orderly administration of justice in matters of concurrent jurisdiction, this Court should respect the state court's characterization of the attachment lien under Ohio law."

This case differs from the case of *United States v. Gilbert Associates*, 345 U. S. 361, where a specific federal tax lien was given priority over a general town lien for taxes in the distribution of an insolvent estate; or the *Security Trust* case, 340 U. S. 47, where no lien existed under the California law in an attachment of personal property; or the *New Britain* case, 347 U. S. 81, where the federal lien was perfected before the statutory lien of a city, the Supreme Court in the latter case basing its decision on the principle of "first in time, first in right."

Since justice must be equal to all, it would seem that the principle should be equally applied to the attachment lien here, perfected and lodged against specific property long before any steps have been taken by the government to assert its claim. The very language of Mr. Justice Minton in the *New Britain* case, *supra*, that "a prior lien gives a prior claim which is entitled to prior satisfaction out of the subject it binds," permits no other conclusion. He further observed that "Congress had this cardinal rule in mind when it enacted Section 3670." The Government had neither a debt nor a lien at the time the property was attached.

Without discussing the particularities of the collateral appeals here strategically combined, we confine ourselves strictly and solely to the issues and facts as developed in our case, the *Acri* case, and accordingly most earnestly urge under the authorities cited, that—

1. An attachment lien validly obtained under the Ohio statutes on specific property creates an absolute right in and to the attached property, as distinguished from a mere inchoate right, which cannot be displaced by subsequent liens.

2. Such lien, duly obtained before the Government has taken any steps to assert its lien for income taxes, will prevail over the Government lien under the rule "first in time is first in right."

3. An attachment of securities and money contained in a certain safe deposit box in a bank and the garnishment of the debtor's savings at such bank is a levy on specific property and gives the attaching creditor a specific lien which will prevail over a subsequent general lien.

4. Such levy made by the sheriff and due return made by him thereof places the attached property in *custodia legis* until the amount of the judgment rendered in the action shall have been satisfied.

5. When such proceeding has been commenced in a state court, subsequent creditors claiming liens must assert their rights in the state court action under the rule of preemption of jurisdiction, including the claim of the Government for priority of lien.

6. Federal courts will follow state statutes and decisions in matters of attachment and garnishment.

7. A statute cannot be construed to give subsequent liens priority over valid subsisting liens; otherwise the constitutional guarantees of due process and equal protection of the laws would be violated.

Respectfully submitted,

JOHN A. WILLO,

FRANCIS B. KAVANAGH,

ISRAEL FREEMAN,

*Attorneys for the Administrator,  
Edward Oravitz, Respondent.*

## **APPENDIX.**

**APPENDIX A (ADDITIONAL PORTIONS OF RECORD).**

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**DEFENDANT'S EXHIBIT A.**

**Judgment of Common Pleas Court in the  
Case of Oravitz v. Acri.**

No. 124,893.

**THE COURT OF COMMON PLEAS  
THE STATE OF OHIO, COUNTY OF MAHONING, SS.**

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EDWARD ORAVITZ,  
administrator of the estate of John Oravec,  
a.k.a. Oravitz, deceased,  
(*Plaintiff*),

vs.

MICHAEL ACRI,  
(*Defendant*).

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**JOURNAL ENTRY.**

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This day this cause came on for trial, and a jury being orally waived in open court by the plaintiff and the defendant, was submitted upon the petition of the plaintiff, the answer of the defendant, evidence and arguments of counsel.

On consideration thereof, and the Court being fully advised in the premises, finds on the issue joined for the plaintiff, and that by reason of the premises, the plaintiff is entitled to recover damages from the defendant.

The Court further finds that the assault by the defendant, upon the late John Oravec, which resulted in the death of John Oravec, as alleged in the petition, was without provocation and justification, and was wrongful, malicious and unlawful.

And thereupon, the Court assesses said damages at Eighteen Thousand Five Hundred (\$18,500.00) Dollars.

IT IS THEREFORE CONSIDERED by the Court, that the plaintiff, Edward Oravitz, administrator of the estate of John Oravec, a.k.a. Oravitz, deceased, recover from the defendant, Michael Acri, the said sum of Eighteen Thousand Five Hundred (\$18,500.00) Dollars, together with his costs.

THE COURT FURTHER FINDS that by an attachment proceeding duly commenced in this action on the 6th day of August, 1947, the plaintiff acquired a valid lien upon the monies, bonds, credits and other property belonging to the defendant, particularly, the monies, bonds and valuables contained in No. 710 box at the safety deposit vault of the Dollar Savings and Trust Company of Youngstown, Ohio; that said lien is a valid and subsisting lien upon said property, as of said 6th day of August, 1947 and for the full payment and satisfaction of the judgment entered herein.

H. B. DOYLE,  
*Judge.*

APPROVED BY:

JOHN A. WILLO,  
*Attorney for Plaintiff,*

W. P. BARNUM,  
*Attorney for Defendant.*

**PLAINTIFF'S EXHIBIT 1.****Notice of Tax Lien Under Internal Revenue Laws.**

No. 5619.

UNITED STATES INTERNAL REVENUE,  
18TH DISTRICT OF OHIO.

November 21, 1947.

Pursuant to the provisions of Sections 3670, 3671, and 3672 of the Internal Revenue Code of the United States, notice is hereby given that there have been assessed under the Internal Revenue laws of the United States against the following-named taxpayer, taxes (including interest and penalties) which after demand for payment thereof remain unpaid, and that by virtue of the above-mentioned statutes the amount (or amounts) of said taxes, together with penalties, interest, and costs that may accrue in addition thereto, is (or are) a lien (or liens) in favor of the United States upon all property and rights to property belonging to said taxpayer, to wit:

Name of taxpayer MICHAEL ACRI.

Residence or place of business—1341 Oak Street,  
Youngstown, Ohio.

NATURE OF TAX	YEAR OR TAXABLE PERIOD ENDED	DATE ASSESSMENT LIST RECEIVED	AMOUNT OF ASSESSMENT
Income	1944 Wash Addl.	79,551.80	79,551.80
TOTAL			79,551.80

THOS. M. CAREY, *Collector*,

By: /s/ W. J. CHAMPION,

*Assistant Collector.*

CERTIFICATE OF OFFICER AUTHORIZED BY LAW  
TO TAKE ACKNOWLEDGMENTS.

STATE OF OHIO,  
COUNTY OF CUYAHOGA, SS:

Before me, this day personally appeared Thos. M. Carey, Collector, by W. J. Champion, to me well known, and well known by me to be the person described in and who executed the foregoing instrument as Assistant Collector of Internal Revenue for the 18th Collection District of Ohio; and he acknowledged before me that he executed the same as such Assistant Collector of Internal Revenue, and for the purpose herein expressed.

WITNESS my hand and official seal at Cleveland, in the County and State aforesaid, this 21 day of November, 1947.

/s/ ETHEL GAVAN,  
Ethel Gavan, Notary Public,  
My Commission expires 1-16-50.

To Recorder, Mahoning County,  
Youngstown, Ohio.

[SEAL]

**PLAINTIFF'S EXHIBIT 2.**

**Notice of Levy.**

Served on: R. W. Dickey, Comptroller

Date Served: November 21, 1947

Time Served: 2.35 p. m.

Served by: /s/ Michael T. Walsh, Dep. Coll.

/s/ Arthur M. Mellott, Spec. Agent.

UNITED STATES OF AMERICA,  
18TH COLLECTION DISTRICT,  
STATE OF OHIO.

To The Dollar Savings & Trust Co.  
At Youngstown, Ohio.

You are hereby notified that there is now due, owing, and unpaid from Michael Acri to the United States of America the sum of Seventy nine thousand five hundred fifty one & 80/100 dollars (\$79,551.80) as and for an internal revenue tax.

You are further notified that all property, rights to property, moneys, credits, and/or bank deposits now in your possession and belonging to the aforesaid Michael Acri and all sums of money owing from you to the said Michael Acri are hereby seized and levied upon for the payment of the aforesaid tax, together with penalties and interest, and demand is hereby made upon you for the sum of Seventy nine thousand five hundred fifty one and 80/100 dollars (\$79,551.80) of the amount now owing from you to the said Michael Acri or for such lesser sum as you may be indebted to him, to be applied in payment of the said tax liability.

Dated at Cleveland, Ohio this 21 day of November, 1947.

THOS. M. CAREY, *Collector,*

By: /s/ W. J. CHAMPION,

*Assistant Collector of Internal Revenue.*

## APPENDIX B (STATUTES).

### Page's Ohio General Code:

SEC. 11819 (RC 2715.01). *Grounds of attachment.* In a civil action for the recovery of money, at or after its commencement, the plaintiff may have an attachment against the property of the defendant upon any one of the grounds herein stated:

\* \* \* \* \*

(10) Has fraudulently or criminally contracted the debt, or incurred the obligations for which suit is about to be or has been brought; \* \* \*

\* \* \* \* \*

SEC. 11837 (RC 2715.19). *When property and garnishee bound.* An order of attachment shall bind the property attached from the time of service. A garnishee shall be liable to the plaintiff in attachment for all property of the defendant in his hands, and money and credits due from him to the defendant, *from the time he is served with the written notice hereinbefore mentioned.* But when property is attached in the hands of a consignee, his lien thereon shall not be affected by the attachment. (Emphasis ours.)

### California Code, Section 542 (a):

The lien of the attachment on real property attaches and becomes effective upon the recording of a copy of the writ, together with a description of the property attached, and a notice that it is attached with the county recorder of the county wherein said real property is situated. \* \* \*

The attachment whether heretofore levied or hereafter to be levied shall be a lien upon all real property attached for a period of three years after the date of levy unless sooner released or discharged either as provided in this chapter, or by dismissal of the action, or by the filing

with the recorder of an abstract of the judgment in the action.

### **Internal Revenue Code:**

#### **SEC. 3670. PROPERTY SUBJECT TO LIEN.**

If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount (including any interest, penalty, additional amount, or addition to such tax, together with any costs that may accrue in addition thereto) shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person. (26 U. S. C. 1946 ed., Sec. 3670.)

#### **SEC. 3671. PERIOD OF LIEN.**

Unless another date is specifically fixed by law, the lien shall arise at the time the assessment list was received by the collector and shall continue until the liability for such amount is satisfied or becomes unenforceable by reason of lapse of time. (26 U. S. C. 1946 ed., Sec. 3671.)

**SEC. 3672** [As amended by Sec. 401, Revenue Act of 1939, c. 247, 53 Stat. 862, and Section 505, Revenue Act of 1942, c. 619, 56 Stat. 798]. **VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS AND JUDGMENT CREDITORS.**

(a) *Invalidity of Lien Without Notice.*—Such lien shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the collector—

(1) *Under State or Territorial Laws.*—In the office in which the filing of such notice is authorized by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has law authorized the filing of such notice in an office within the State or Territory; or

(2) *With Clerk of District Court.*—In the office of the clerk of the United States district court for the judicial

district in which the property subject to the lien is situated, whenever the State or Territory has not by law authorized the filing of such notice in an office within the State or Territory; or

(3) *With Clerk of District Court of the United States for the District of Columbia.*—In the office of the clerk of the District Court of the United States for the District of Columbia, if the property subject to the lien is situated in the District of Columbia. (26 U. S. C. 1946 ed., Sec. 3672.)